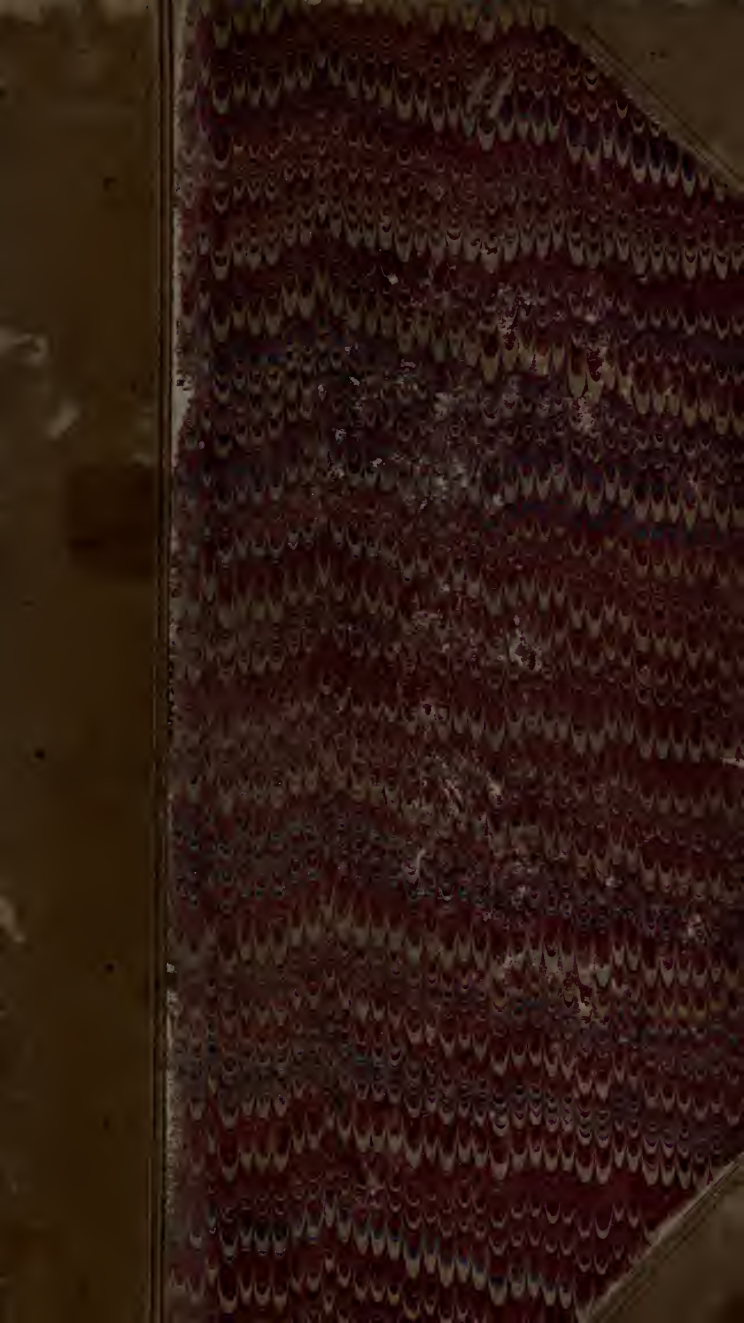

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MANUAL

OF

COMMON LAW

FOR

PRACTITIONERS AND STUDENTS,

COMPRISING

The Fundamental Principles

AND

THE POINTS MOST USUALLY OCCURRING IN DAILY LIFE AND PRACTICE.

BY

JOSIAH W. SMITH, B.C.L., Q.C.,

ETIRED JUDGE OF COUNTY COURTS, AND A BENCHER OF LINCOLN'S INN,

ITOR OF "FEARNE'S CONTINGENT REMAINDERS," AND MITFORD'S "CHANCERY PLEADINGS," AUTHOR OF "A COMPENDIUM OF THE LAW OF REAL AND PERSONAL PROPERTY," "A MANUAL OF EQUITY," AND "A MANUAL OF BANKRUPTCY;" AND ONE OF THE CONSOLIDATORS OF THE CHANCERY ORDERS.

Ninth Edition.

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1880.

TO

SIR ROUNDELL PALMER, KNT., Q.C., M.P.,

(AFTERWARDS BARON SELBORNE,
LORD HIGH CHANCELLOR OF GREAT BRITAIN),

FROM FEELINGS OF THE HIGHEST RESPECT

FOR

HIS PRIVATE, FORENSIC, AND PUBLIC CHARACTER,

This Manual

WAS, BY PERMISSION, INSCRIBED,

June, 1870.

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PREFACE

TO

THE NINTH EDITION.

THIS volume is founded on about seventy text-books, which are referred to in it as often as any use has been made of them, and in other instances where a reference to them seemed desirable. And it was designed as *a Companion to the Author's Manual of Equity,* for many years used for examination by the Council of Legal Education at Lincoln's Inn, the thirteenth edition of which has recently been published.

The Student may not be able to resort to the treatises on the more *specific* heads of Law which are cited in these pages; but it will of course be expedient for him to pass on from the perusal of this book to the study

of some other *general* text-books. And the Author would recommend him to read Broom's "Commentaries on the Common Law, designed as introductory to its study;"* and then, if he has the time at his command, to take up Stephen's Commentaries, Chitty's or Addison's Contracts, Addison's Torts, the works of the late John William Smith on Leading Cases and on Contracts, and Best on Evidence.

Another course for the Student to adopt, would be, first to read through this Manual once or twice by itself; and then to consult those works, as referred to in this book, when he peruses it for the second or third time.

By adopting either of these two plans, he would be enabled to enlarge, explain, and illustrate, by memory or manuscript additions, what he had read in the following pages.

But whether this Manual be used as a

* Mr. Broom's work on Legal Maxims would also be most useful to the student, though not cited in these pages.

first-book or as a second-book, the Student would probably do well to read it as his final text-book. This would tend to revive and fix in his mind some 2000 leading points of the most constant recurrence in daily practice, as comprised in the following pages, besides other points, cases, and reasons, associated with them by the perusal of other works.

As, of course, this work is not at all a substitute for the larger works above mentioned, comprising, as each of them does, a mass of points, cases, and comments, necessarily excluded from this—and as in fact it is entirely different, in its nature and the purposes for which it is adapted, from the works on which it is founded, and from all other works on Common Law, and therefore cannot be regarded as competing with any of them; so, on the other hand, the writer believes that, for the same reasons, none of them would serve as a substitute for it; and that consequently *it may be considered as simply an attempt to supply a vacant place.*

Very great has been the expenditure of

time and thought, in selecting, arranging, digesting, compressing, defining, distinguishing, and qualifying, which the preparation of it has involved. It bears the same relation to the text-books cited in it, as those books bear to the Reports and Treatises on which they are founded. And, in general, if the Reader wishes to have the unabridged and unaltered language of the writers cited upon any point, he must turn to their pages, as referred to, for their precise language, as well as for the cases, reasons, illustrations, and other matter connected with such point, to be found in their writings. To have added these would neither have been right towards those Authors, nor compatible with the limited bulk, price, and design of this volume.

To his very learned friend, Mr. O. D. Tudor (who has done so much service to the Profession by his well-known most valuable works on various branches of the Law), and to his talented College friend, Mr. George Miller, of Lincoln's Inn and of the Home Circuit, the Author is indebted for kindly

perusing the proof sheets of the first edition and offering some useful suggestions.

In the first edition the Author was very careful not to insert any points from works which were not of recent date, unless such points were also contained in works of recent date referred to by him. And he has since inserted such of the subsequent Statutes, and of the Cases from the authorised reports, published since those recent works, as appeared requisite to be added in a book of this kind.

The points connected with Conveyancing, though they may have been decided in the Common Law Courts, are purposely omitted. For these the Reader is referred to the Author's Compendium of the Law of Real and Personal Property, fifth edition.

For the imperfections of the present attempt, the generous Reader will make allowance when he considers how extensive is the field of legal lore which it has been necessary to traverse.

To be very concise, and yet clear, is admitted to be a very difficult task. Although

the points comprised in the following pages are expressed in the smallest possible compass, the Author trusts that they are clearly expressed. The Student, however, may probably regard this as a "hard book." But how can a book be otherwise than hard, in some parts and in some degree at least, when many of the distinctions and qualifications are in their own nature complex or refined; and when it contains such a multitude of points in a small space? Yet it would be infinitely harder, and in fact impossible, for a Student to put himself in possession of the same number of points, if he had to do what the Author has done—if, besides other difficult processes, he had to collect these points when scattered over many thousands of pages in many different volumes, and intermixed with a countless number of other minor points; and if he had to pick up a part of a rule from one book, another part from another book, and very important distinctions, qualifications, or exceptions from other books. The difficulty, in the case of a book like this, is on the very surface,

and therefore strikes at once. But it is very far less than the more latent difficulty of mastering the same number of points in any other way. In the one case, the crowding of propositions on the mind is of course attended with a sense of labour; but that labour is all effectual, and is short. In the other case, the Student passes on more easily and pleasantly, and he fancies he has made great progress, because he has waded through a great number of pages. But if the result of the two modes of study were compared, the knowledge acquired in the latter case would be found to be very little more than a general and inaccurate impression, limited to a few points, and likely to fade, and incapable of being revived without great labour; whereas the knowledge acquired by the help of a book like the present, would be found to be comparatively specific, accurate, and complete, and would have been gained in an incomparably shorter time, and at a very trifling cost, and may be revived very easily and speedily.

The Judicature Acts, 1873 and 1875, would

seem likely to have very little effect either upon this Manual or on the Manual of Equity, as they almost entirely relate to *Pleading and Practice, and not to Jurisprudence, which is the exclusive subject of these Manuals.* They do not make any general fusion of Law and Equity; but the first Act consolidates the different Superior Courts by which Law and Equity are administered into one Court, which is divided into several "Divisions." And section 24 enables every Judge of that Court to deal concurrently with matters of Law and Equity between the same parties. Section 89 (Appendix, page 627) gives similar power to the Judges of Inferior Courts, to the extent of their jurisdiction. Section 25 makes a few changes in certain points of jurisprudence. (Appendix, pp. 623–626, and see par. 1054.) And section 25 also comprises the important enactment, clause (11), (Appendix, page 626) that "generally in all matters not hereinbefore particularly mentioned, in which there is any conflict or variance between the rules of Equity and the rules of the Common Law with reference

to the same matter, the rules of Equity shall prevail."

To notice, in their proper places, the few changes specifically made by s. 25 (as altered by the Act of 1875, s. 10) is all that the Author has considered it necessary or safe to do. Where there is a variance between the rules of Equity and Common Law, it will appear from the Manuals as they stand; and clause (11) above quoted will determine that the former shall prevail.

These Statutes will doubtless be very beneficial as affecting *pleading and practice*, by brushing away a vast quantity of rubbish, and rendering pleading and practice more subservient to the purposes of justice, rather than obstructive to the ends of justice, and in fact subversive thereof, as they too often have been. But the importance of these measures, as regards *Jurisprudence*, would seem to be small.

J. W. S.

September, 1880.

ADDENDUM.

Page 135, line 3, for The principal Game Act "*is*" read "*was*." And at end of par. 327 add—By the stat. 43 & 44 Vict. c. 47, the Ground Game Act, 1880 (passed 7th Sept., 1880, after this Manual was printed), further provision is made to enable occupiers of land to protect their crops from injury and loss by ground game.

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TO TEXT-BOOKS ON WHICH THIS WORK IS FOUNDED, AND THE EDITIONS USED.

Abbreviations.	Fuller Titles.	Editions (a).
Abbott . . .	Abbott on Shipping . .	9th
Ad. Con. . .	Addison on Contracts . .	5th
Ad. Torts . .	Addison on Torts . . .	1st
Archb. Prac. . .	Archbold's Practice of the Q.B.	9th
Arnould . .	Arnould on Insurance . .	2nd
Bayley . . .	Bayley on Bills . . .	6th
Best . . .	Best's Law of Evidence . .	3rd
Bl. Com. . .	Blackstone's Commentaries .	
Bright . . .	Bright's Husband and Wife .	1st
Broom Com. . .	Broom's Commentaries . .	2nd
Bunyon . . .	Bunyon on Life Insurance .	1st
Burge . . .	Burge on Suretyship . .	1st
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Chit. B. . .	Chitty on Bills . . .	10th
Chit. Con. . .	Chitty on Contracts . .	7th
Chit. & Tem. on Car.	Chitty and Temple on Carriers	1st
Co. Litt. . .	Coke upon Littleton . .	
Cole Eject. . .	Cole on Ejectment . .	1st
Coote Landl. & Ten.	Coote's Landlord and Tenant .	1st
Cross . . .	Cross on Lien . . .	1st
Cru. . . .	Cruise's Digest . . .	3rd
Dixon . . .	Dixon's Law of the Farm .	2nd
Gale . . .	Gale on Easements. . .	3rd
Gibbon . . .	Gibbon on Dilap. and Nuis. .	2nd
Gilbert . . .	Gilbert on Distress. . .	3rd
Grant . . .	Grant on Bankers . . .	2nd
Jones Bail. . .	Jones on Bailments . .	4th
Lindley . . .	Lindley on Partnership . .	1st
Locke . . .	Locke's Game Laws . .	5th
Maclachlan . .	Maclachlan on Shipping . .	1st
Macph . . .	Macpherson on Infants . .	1st
Macq. . . .	Macqueen on Divorce . .	2nd

(a) These are the Editions used, except where otherwise specified.

Abbreviations.	Fuller Titles.	Editions.
Mau. & Pol.	Maude and Pollock on Shipping	2nd
Mayne	Mayne on Damages	1st
Morton V. & P.	Morton's Vendors and Purchasers of Personal Chattels	1st
Oliph.	Oliphant on Horses	2nd
Paley	Paley on Principal and Agent	3rd
Phil. Lun.	Phillips on Lunacy	1st
Powell	Powell on Evidence	2nd
Pres. Shep. T.	Sheppard's Touchstone by Preston	
Pulling	Pulling on Attorneys and Solicitors	3rd
Rosc.	Roscoe on Evidence	10th
Selw.	Selwyn's Nisi Prius	12th
Sm. Action	Smith's (John W.) Action at Law	7th
Sm. Con.	Smith's Contracts	3rd
Sm. Landl. & Ten.	Smith's Landlord and Tenant	1st
Sm. L. C.	Smith's Leading Cases	5th
Sm. Merc. Law	Smith's Compendium of Mercantile Law	6th
Sm. Eq. Manual	Smith's (Josiah W.) Manual of Equity	13th
Sm. Law of Prop.	Smith's Compendium of the Law of Real and Personal Property	5th
Sm. Mast. & Serv.	Smith's (Charles Manley) Master and Servant	2nd
Steer Par. Law	Steer's Parish Law	3rd
Ste. Com.	Stephen's Commentaries	4th
Ste. Lect.	Stephen's Lectures on Mercantile Law	1st
Story Eq.	Story's Equity Jurisprudence	
Story on Agency	Story's Law of Agency	2nd
Sug. V. & P.	Sugden's Vendors and Purchasers	14th
Tapp	Tapp on Maintenance	1st
Tapping	Tapping on Mandamus	1st
Tomlin	Tomlin's Law Dictionary	
Trower	Trower on Debtor and Creditor	1st
Tudor Ca. on M. L.	Tudor's Leading Cases on Mercantile Law	1st
Tudor Real Prop. Ca.	Tudor's Leading Cases on Real Property and Conveyancing	1st
Wharton	Wharton's Law Lexicon	2nd
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(*a*) This comprises about 780 cases from the authorised reports published during the last few years. (See Preface, p. ix.) For the earlier cases, the reader is referred to the works on which this Manual purports to be founded.

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Smith's Common Law

PART I.

OF PRIVATE RIGHTS AND WRONGS CONCERNING THE PERSON, CHARACTER, OR REPUTATION.

25-

CHAPTER I.

OF CORPORAL SECURITY.

Right to life and corporal security.

LIFE is the immediate gift of God, a right inherent by nature in every individual. (1 Bl. Com. 129, 134.) And as a general rule, everyone is also entitled to immunity from all corporal insults and injuries. **1.**

Injuries to corporal security.

Injuries to corporal security are either direct or consequential. (Broom Com. 662; 3 Ste. Com. 461.) **2.**

Evil intent.

In order to maintain an action for a bodily injury, whether direct or consequential, it is not essential to show that it originated in any evil intent, or was wilful. A person may be sued for an act done accidentally or by mistake, unless it was unavoidable or occasioned by the plaintiff's negligence. Frequently, however, such injuries may be made the subject of a criminal prosecution; and in that point of view the existence of a criminal intent may be most material. (Broom Com. 662-3; Rosc. 592; Ad. Torts, 3rd ed. 585; *Skelton* v. *London and N. W.*

PART I. CAP. I.

Ry. Co., L. R. 2 C. P. 631; *Holmes* v. *Mather*, L. R. 10 Ex. 261.) **3.**

SECTION I.

Of Direct Injuries to Corporal Security.

SEC. I.

Corporal security may be directly affected by threats, assault, battery, wounding, or mayhem. **4.**

Threats.

1. Threats of bodily hurt, through fear of which a person's business is interrupted, are a ground of action. But they do not constitute a ground of action where they produce no inconvenience. (3 Ste. Com. 459.) **5.**

Assault.

2. A laying hands on the person of another, or touching him directly or indirectly (as by overturning his carriage or chair), whether intentionally or not, or an apparent attempt or offer, coupled with a present ability, to do hurt to the person of another, constitutes an assault. So that even the holding up a fist or shaking a whip, when near enough to be able to hit, or advancing with a whip or a fist uplifted in a threatening manner, is an assault. (Selw. 26; Ad. Torts, 2nd ed. 481; Broom Com. 664; Rosc. 592.) **6.**

3. A battery includes an assault; but as distinguished from a mere assault, it is the actual and unwarrantable striking a person or in any way touching him, in a violent, angry, rough, rude, or insolent manner. And of this nature is the act of pouring water on a person, or spitting in his face. (Ad. Torts, 2nd ed. 483; Broom Com. 664, 666; 3 Ste. Com. 459; Selw. 4; Rosc. 592.) **7.**

3. Battery.

4. Wounding is an aggravated species of battery, amounting to a bodily hurt. **8.**

4. Wounding.

5. Mayhem is the depriving a person of, or injuring, a member of the body which is available for fighting (such as a leg, an arm, an eye, or a fore tooth), or otherwise injuring him corporally in such a manner as to diminish his power of fighting or defending himself. And for this, or for wounding, heavy damages are recoverable, unless the act amounts to a felony, or can be justified or excused. (Ad. Torts, 396; 3 Ste. Com. 460; Wharton.) **9.**

5. Mayhem.

Assault and battery in defence.

If the plaintiff was the aggressor, and struck or even only assaulted the defendant in the first instance, and the act of the defendant was in actual self-defence, it is justifiable. And an assault and battery is justifiable when in actual defence of a wife or husband, parent or child, master or servant,

neighbour or friend. But if a blow is struck after all danger is past, it is not justifiable. (Ad. Torts, 4th ed. 569, 572, 602, 606; Broom Com. 665; 3 Ste. Com. 461; Rosc. 594; Selw. 32.) **10.**

Where mayhem is excusable.

When a person has been assaulted in such a way as to put him in fear of grievous bodily harm, mayhem inflicted in self-defence is excusable. **11.**

Disproportionate injury in return.

But a person may not inflict an injury in self-defence wholly disproportionate to the injury he has received or has reason to apprehend. (Ad. Torts, 4th ed. 606; Rosc. 594-5.) **12.**

Forcible ejection, or assault and battery in defence of property.

A churchwarden or beadle or constable may, if necessary, lay hands upon a person, to turn him out of church, or any duly certified place of religious worship, or burial ground, for improper behaviour. (Broom Com. 665–6; 3 Ste. Com. 461; Ad. Torts, 3rd ed. 559; 23 & 24 Vict. c. 32, ss. 2, 3.) **13.**

An assault and battery may also be justified on the ground of its being in defence of the possession of a house or close, or of chattels. If a person forcibly enters into a house, he may be forcibly ejected. If he enters quietly, he must be requested to retire before he can be lawfully turned out, and

then, if he refuses to retire, the owner may compel him. But in neither case may an unnecessary degree of force be resorted to. (Ad. Torts, 3rd ed. 578; Selw. 32–3; Broom Com. 665; 3 Ste. Com. 461; Rosc. 597; Locke, 47, 48.) **14.**

Moderate chastisement of child, apprentice, or mariner.

An assault and battery is also justifiable when it amounts to moderate and needful chastisement of a child, or an apprentice, or a scholar, or a mariner on board a merchant vessel. (Ad. Torts, 4th ed. 602.) **15.**

Forcible entry.

A forcible entry is not lawful, even where the law gives a right of entry. (Ad. Torts, 398; Cole Eject. 69, 70, 686–690; Woodf. 858, 860.) **16.**

Putting down an affray.

In the case of an affray, any person is justified in interfering and using such a degree of force as may be necessary for the purpose of separating the combatants and putting an end to it. (Ad. Torts, 398–9; 1 Burn, 56.) **17.**

Mode of redress for assault.

Cases of assault may be tried before two justices; and if they give a certificate of dismissal to the party accused, or if he shall have been convicted, and paid the fine, or suffered the imprisonment, he shall be released from all further proceedings, civil or criminal, for the same cause. (24 & 25 Vict. c. 100; Ad. Torts, 4th ed. 600.) **18.**

Section II.

Of Consequential Injuries to Corporal Security.

Consequential, as distinguished from direct injuries, frequently arise from nuisances or from negligence. **19.**

Injuries from nuisances or negligence.

Definition of a nuisance.

A nuisance is something done which has the effect of prejudicially and unwarrantably affecting the enjoyment of the rights of another person. **20.**

Where redress not granted for a thing as a nuisance.

Redress cannot be obtained for a thing as a nuisance, where it merely involves a reasonable use of the rights of the person charged with creating it, and it merely abridges the pleasure of the person suffering from it: it must, at the least, unwarrantably render the enjoyment of life or property uncomfortable. And hence the carrying on an offensive trade may be actionable if carried on in one locality, but not so if carried on in another. (See Ad. Torts, 74; Rosc. 514, 515; Selw. 1129–1131; *Bamford* v. *Turnley*, 3 Best & Sm. 62; *Cavey* v. *Ledbitter*, 13 C. B. (N. S.) 470; *Tipping* v. *St. Helen's Smelting Co.*, 4 Best & Sm. 608, 616; 11 H. L. Cas. 642; *Crump* v. *Lambert*, L. R. 3 Eq. 409. And see infra, par. 270–5.) **21.**

Different sorts of nuisances.

Some nuisances affect the enjoyment of rights concerning the person: others affect the enjoyment of proprietary rights. Some of the former are noticed in this section: some of the latter in a subsequent page. **22.**

Nuisances are either public or private. Public or common nuisances are those things which prejudicially affect the public, *i.e.*, all persons who come within the sphere of their operation, though they may affect some persons more than others. Private nuisances are things prejudicial to the enjoyment of private rights. (Broom Com. 693; 3 Ste. Com. 490.) **23.**

Obligation on the part of occupier of property fixed or movable.

There is an obligation on the part of the occupier of property, whether fixed or movable, to those who (at his invitation, expressed or implied) come on that property, to take, by himself and servants, reasonable care that the person so coming shall not be exposed to unusual danger. (*Smith* v. *Steele*, L. R. 10 Q. B. 125, 127.) **24.**

Unguarded wells or shafts.

If a person lawfully traversing land falls into an unguarded well or mining shaft, without negligence or misconduct on his part, the occupier of the land is responsible in damages. But if the person injured were trespassing, and the well or shaft were more than twenty-five yards from a public carriage-

way, the occupier would not be liable. (Ad. Torts, 80, 95; 5 & 6 Will. IV. c. 50, s. 70.) **25.**

Dangerous paths.

If a landowner suffers a path to his house to be used, he is responsible for any act of his whereby injury arises to other persons who have any reasonable occasion for coming to the house, without giving them timely notice, or revoking the licence to use it. (Ad. Torts, 3rd ed. 164.) **26.**

Dangerous vaults, areas, holes, or sewers.

If a householder or occupier of premises leaves a cellar, vault, area, hole, or sewer unguarded, or insufficiently covered over, and so close to a highway as to be dangerous to passengers in the dark or in foggy weather, he is responsible for any injury occasioned thereby. (Ad. Torts, 82, 96; Rosc. 528–9; *Hadley* v. *Taylor*, L. R. 1 C. P. 53; *Holmes* v. *North Eastern Ry. Co.*, L. R. 4 Ex. 254; 6 Ex. (Ex. Ch.) 123. In connection with this point, see *Robbins* v. *Jones*, 15 C. B. (N. S.) 221.) **27.**

If the landlord is bound to do the repairs, he is the party to be sued; but if the tenant has covenanted to repair, he is the person liable. (*Pretty* v. *Bickmore*, L. R. 8 C. P. 401.) **28**

Where there is a hole or shoot on premises which is unreasonably dangerous to persons

not usually employed there, though it be necessary, the occupier of the premises will be responsible in damages, if he suffers it to be unfenced when not in use, and a person having lawful business there sustains injury thereby. (*Indermaur* v. *Dames*, L. R. 1 C. P. 274; 2 C. P. (Ex. Ch.) 311.) **29.**

Over-hanging lamp.

If a tenant of a house knowingly allows a lamp hanging from it over the street to be out of repair, and it falls, and injures a passenger, the tenant is liable, even if he ordered a tradesman to repair it, and the latter failed to repair it effectually. (*Tarry* v. *Ashton*, L. R. 1 Q. B. D. 314.) **30.**

Ferocious or mischievous animals.

Whoever keeps an animal which is wont to attack mankind, is liable to an action for damages for any injury caused by it, if he knew, or there is some evidence that he knew, its propensity. If a dog has once bitten a person under circumstances which would not excite any dog of good temper to bite, and the owner has notice of it, he ought to tie up or muzzle the dog. But a person may allow a fierce dog to be loose at night for the protection of the premises; yet not in the open approaches to a house, so as to injure persons lawfully coming to it. And a man has no right to put a dog so near a path, even a private path, with such a length

of chain that he could bite a person going along it. (Ad. Torts, 2nd ed. 158–9 ; Rosc. 525, 526; Dixon, 110–121; *Worth* v. *Gilling*, L. R. 2 C. P. 1 ; *Applebee* v. *Percy*, L. R. 9 C. P. 647.) **31.**

A servant's knowledge of a dog's ferocity is the knowledge of the master, if the employment of the servant is such as to make it his or her duty to communicate the information to the master, and it is likely that it was so communicated. (*Baldwin* v. *Casella*, L. R. 7 Ex. 325 ; *Applebee* v. *Percy*, L. R. 9 C. P. 647.) **32.**

If a person has any description of animal (other than a dog) which is wont to kick or bite, or in any way injure other animals, and there is some evidence of his knowledge of its ferocious or mischievous nature, he is liable for the damage. (Ad. Torts, 4th ed. 193, 198, 212 ; Rosc. 12th ed. 674. And see two preceding paragraphs.) **33.**

Injury from negligence or carelessness in other cases.

An action may also be maintained for injuries to corporal security arising from negligence or want of proper care in other cases. (*Smith* v. *London & St. Katharine Docks Co.*, L. R. 3 C. P. 326; *Kearney* v. *London, Brighton, & South Coast Railway Co.*, L. R. 6 Q. B. (Ex. Ch.) 759; *White* v. *France*, L. R. 2 C. P. D. 308. But see

Welfare v. *London & Brighton Railway Co.*, L. R. 4 Q. B. 693.) (*a*). **34.**

A duty attaches where a person is using or is dealing with a highly dangerous thing (such as gas) which, unless managed with the greatest care, is calculated to cause injury to others. To support an action in such a case, there need be no privity of contract between the party injured and him by whose breach of duty the injury is caused, so long as there is a misfeasance independent of contract. (*Parry* v. *Smith*, L. R. 4 C. P. D. 325, 327.) **34a.**

Injuries from furious or careless driving.

When a coach is overturned and a passenger is thrown out, owing to the carelessness of the driver, the passenger may bring an action against the coach proprietor. (3 Ste. Com. 461 ; Rosc. 518.) And a person walking or riding on a road, who sustains an injury in consequence of the furious,

(*a*) As to *Nelson* v. *The Liverpool Brewery Co.*, L. R. 2 C. P. D. 311 ; and *Pearson* v. *Cox*, 2 C. P. D. (Ap.) 369, they appear to the writer to be clearly wrong. If the former were right, one of two consequences must follow : either that a landlord might keep a house in a ruinous state, to the injury, even the fatal injury, of the public, or else that the tenant must do landlord's repairs contrary to express agreement. As between himself and his tenant, the landlord was not bound to repair : as between himself and every one else, he was liable for any damage caused by the dangerous state of the premises.

careless, or negligent driving of another, may maintain an action, unless his own want of reasonable care conduced to the injury. (See Oliph. 225.) **35.**

Duty of persons driving and walking.

A person driving is not bound to keep on his proper driving side; but when on the other side, he must use greater care to avoid a collision. A person driving over a crossing for foot-passengers, or in a crowded part, ought to drive slowly and carefully; but it is also the duty of a foot-passenger to use due care, so as not to get recklessly among the carriages. (Ad. Torts, 240; Oliph. 241–3; Rosc. 520–1; Ad. Con. 484.) **36.**

Horses running away.

A person is not liable for an unavoidable accident occasioned by his horses running away, where there was no negligence or want of ordinary ability on his part, or that of his servant. (*Holmes* v. *Mather*, L. R. 10 Ex. 261.) **37.**

Presumption of negligence.

Some accidents of themselves raise a presumption of negligence, so as to cast the burden on the defendant of proving an absence of negligence. (*Byrne* v. *Boodle*, 2 Hurl. & Colt. 722.) **38.**

Liability of railway companies for accidents on a level crossing.

Where a railway crosses on a level a public road, and the gates across the public road are left open on the side of the line, and a person enters on that side, intending to cross

as soon as a train passing on the other side should have passed, and he is knocked down by a train passing on the side on which he has entered, though he might have seen it coming if he had looked, the company are liable for negligence, inasmuch as it is the duty of the company, under the stat. 8 Vict. c. 20, s. 47, to keep the gates closed when trains are approaching; and the fact that the gates on one side were open was an intimation that the line on that side was safe. (*Wanless* v. *North Eastern Ry. Co.*, L. R. 6 Q. B. (Ex. Ch.) 481; 7 H. L. 12.) **39.**

Injuries to the health.

It may here be added that redress may be had by action for injuries to the health of an individual, by the sale of bad wine or provisions or chemical preparations, or by the neglect or unskilful treatment of his medical attendant. (Broom Com. 692, 695–6; 3 Ste. Com. 462; *George* v. *Skivington*, L. R. 5 Ex. 1.) **40.**

Action by personal representative of a person killed.

When the death of a person is caused by a tort which would have entitled him or her to damages, an action for damages may be brought by his or her personal representative for the benefit of his or her wife, husband, parent, grand-parent, step-parent, legitimate children, grand-children and step-children, in such shares as the jury shall direct; and the

measure of damages is the pecuniary loss to the family from the death. Compensation may be given in this way, not only for an actual pecuniary loss, but even for the extinction of a reasonable expectation of pecuniary advantage, whether to be derived in money, or in the shape of maintenance, education, and social comfort, procurable by money, and which the family, but for the death of the injured person, might probably have enjoyed. But it has been held that the jury cannot take into consideration the funeral expenses or mourning, or the mental suffering occasioned to the family. (9 & 10 Vict. c. 93; Broom Com. 689–691; Wms. Ex. 710–711; Ad. Torts, 254, 267; Rosc. 534; Chit. Con. 453–4; *Pym* v. *Great Northern Ry. Co.*, 2 Best & Sm. 759; 4 Best & Sm. 369; *Senior* v. *Ward*, 1 Ell. & Ell. 385; *Dickenson* v. *North Eastern Ry. Co.*, 2 Hurl. & Colt. 735.)

41.

If there is no executor or administrator of the deceased person, or if, within six calendar months after the death of such person, no action is brought by or in the name of the executor or administrator, then it may be brought by or in the name of all or any of the persons, and will be for the benefit of the same persons, for whose benefit

such action would have been if it had been brought by or in the name of the executor or administrator. (27 & 28 Vict. c. 95, s. 1.) **42.**

If the deceased person received in his lifetime compensation for the injury, no fresh action can be brought for it after his death. (*Read* v. *Great Eastern Ry. Co.*, L. R. 3 Q. B. 555.) **43.**

Where a passenger on a railway is injured by an accident, and after an interval dies in consequence thereof, his personal representative may recover the damage to his personal estate arising in his lifetime from medical expenses and loss occasioned by his inability to attend to business. (*Bradshaw* v. *Lancashire and Yorkshire Ry. Co.*, L. R. 10 C. P. 189.) **44.**

CHAPTER II.

OF CORPORAL LIBERTY.

Corporal liberty defined.

EVERY adult has an inherent right of personal liberty, which consists in the power of locomotion without restraint other than by the due course of law. (1 Ste. Com. 145.) **45.**

How violated.

This right may be violated by wrongful, usually termed false, imprisonment, or by wrongful, usually termed malicious, arrest. **46.**

Definition of wrongful or false imprisonment.

Wrongful or false imprisonment is a trespass committed by arresting and detaining a person without legal grounds, or without legal warrant duly executed, whether such detention be in a prison or in a private house, or in the street or elsewhere. (Ad. Torts, 4th ed. 575; Broom Com. 696; 3 Ste. Com. 471–2; Selw. 919.) **47.**

In what it consists.

To constitute imprisonment, it is not necessary that the person said to be imprisoned should be under any physical restraint or confinement. Any restraint on the free power of locomotion in a lawful direction, though

it be only by a show of force or even by mere show of authority, constitutes imprisonment. (Ad. Torts, 4th ed. 575.) **48.**

Authority of a justice of the peace to arrest.

If a justice of the peace sees a felony or other breach of the peace committed in his presence, he may personally apprehend the offender or command any other person to apprehend him; but if the offence is committed in his absence, he must issue his warrant in writing to apprehend the offender. (Broom Com. 705; 1 Burn, 272.) **49.**

Where a constable may arrest without warrant.

Except in cases specified in certain enactments, a constable may not arrest a person, without warrant, merely on suspicion of his having committed a misdemeanour. But if a constable has reasonable cause to suspect that a person has committed a felony, or if one man makes a reasonable charge of felony against another and requires a constable to arrest him, the constable may detain him until he can be brought before a magistrate; and the constable will be secure, though it turn out that no felony was committed. (Ad. Torts, 4th ed. 576–8, 603; Davis's Co. Court, 4th ed. 711; Broom Com. 700, 702; 1 Burn, 273; Selw. 936; infra, par. 53–65.) **50.**

A constable may ex officio arrest a person who in his presence is a breaker of the

peace, or has committed or threatens to commit any other offence, and keep him until he can bring him before a magistrate. (Ad. Torts, 4th ed. 580; 1 Burn, 274; Selw. 938.) But it has been held that an imprisonment cannot be justified on the ground that the plaintiff unlawfully entered the defendant's house, and made a great noise and disturbance therein (without the allegation of a breach of the peace), and would not depart when requested. (Ad. Torts, 4th ed. 604.) **51.**

There are a number of offences mentioned in the statutes relating to the metropolis, for which a person may be arrested by the police without warrant. (Ad. Torts, 4th ed. 583–4.) **52.**

Where a private person may arrest without warrant.

As a general rule, a private person may not, without warrant, arrest another for a misdemeanour, except to prevent the continuance or the threatened renewal of a breach of the peace. (Ad. Torts, 4th ed. 578; Broom Com. 697.) **53.**

Any bystander is authorised, and indeed bound, to arrest an affrayer, and deliver him over to a peace officer, to be carried before a magistrate, in order that he may be compelled to find sureties for keeping the peace. But a private individual may not do this

after the affray is over, unless the affrayers remain, and there is reasonable ground for apprehending a renewal of the disturbance. If the affrayers disperse, they may not be pursued, or given or taken into custody. (Ad. Torts, 4th ed. 580; Broom Com. 697; 1 Burn, 276; Selw. 938.) **54.**

Anyone is justified, and indeed bound, to arrest a person who in his presence has committed or attempted to commit a felony or inflicted a dangerous wound, or to prevent a person from committing a felony, or to assist an officer demanding his help for the taking of a felon or the suppression of an affray. (1 Burn, 275; Selw. 938.) **55.**

A person found committing an offence against the Act relating to Malicious Injuries to Property, may be apprehended without a warrant, if taken in the very act, by any peace officer, or the occupier or landlord of the property injured, or his servant, or any person authorised by him, and taken before some neighbouring magistrate. (24 & 25 Vict. c. 97, s. 61; Ad. Torts, 4th ed. 579.) **56.**

Anyone found committing an indictable offence between 9 p.m. and 6 a.m. may be apprehended by any private individual, and conveyed by him, or delivered to some peace

officer to be conveyed before a magistrate. (Ad. Torts, 4th ed. 580; 14 & 15 Vict. c. 19, s. 11.) **57.**

Any person disturbing Divine Service may be apprehended by a constable or churchwarden, and taken before a magistrate. (Ad. Torts, 4th ed. 582; 23 & 24 Vict. c. 32, ss. 2, 3.) **58.**

Anyone found committing an offence on or with respect to property under the Metropolitan Police Act may be arrested by the owner of the property, or by his servant, or any person authorised by him, and may be detained until he can be delivered into the custody of a constable. But the offender must be arrested in the very act, and not afterwards, however recently. (Ad. Torts, 3rd ed. 561; 2 & 3 Vict. c. 47, ss. 63, 66.) **59.**

Anyone found committing an offence against the Larceny Consolidation Act may be apprehended by any person without warrant, and taken before a magistrate. And a person to whom property is offered to be sold, pawned, or delivered, if he has reasonable cause to suspect that any offence against the Act has been committed with respect to such property, may, and ought to apprehend the party offering the same and take him

before a magistrate. And in certain other cases, a pawnbroker may arrest a person, and hand him over to a policeman. (24 & 25 Vict. c. 96, s. 103; 35 & 36 Vict. c. 93, s. 34; Ad. Torts, 4th ed. 578.) **60.**

Powers of arrest are also given by the Vagrant Acts (5 Geo. IV. c. 83, &c.); the Merchant Shipping Act (25 & 26 Vict. c. 63, s. 37); by Railway Acts (Ad. Torts, 4th ed. 582–4), and by the Pawnbrokers Act (35 & 36 Vict. c. 93). **61.**

Except in such special cases as these, in order to justify a private individual in causing the arrest of another without a warrant, he must prove the commission of a felony, and the existence of reasonable and probable cause for fairly suspecting that the plaintiff either committed it or was implicated in it. (Ad. Torts, 4th ed. 578; Broom Com. 699, 700; Selw. 937; 1 Burn, 275; *Perryman* v. *Lister*, L. R. 3 Ex. (Ex. Ch.) 197.) **62.**

A private individual who, except in such special cases and without such legally sufficient grounds, directs a police officer to take a person into custody without a magistrate's warrant, thereby renders himself liable to an action for false imprisonment, in which, if it is successful, heavy damages are usually given. But when a person is arrested under

a warrant, the person making the charge will be safe unless he acted maliciously and without reasonable and probable cause. (Broom Com. 701 ; 1 Burn, 277 ; *Perryman* v. *Lister*, L. R. 3 Ex. (Ex. Ch.) 197.) **63.**

The question of reasonable and probable cause is to be decided by the judge, as if it were a question of law, on facts found by the jury. (Ad. Torts, 4th ed. 603; *Lister* v. *Perryman*, L. R. 4 H. L. 521, 535, 538–9. And see infra, par. 126–138.) **64.**

A corporation is responsible for a wrongful imprisonment by one of its servants, if within the scope of his authoriry. (See Ad. Torts, 4th ed. 596–7.) **65.**

How far a person is responsible for imprisonment or arrest by a judge, magistrate, or police officer.

A person is not responsible for orders or decrees of judges or justices before whom he has laid a complaint bonâ fide. But every private unofficial person, not acting in the authorised execution of legal process, is responsible in damages for a wrongful imprisonment ordered, directed, or authorized by him, or for a wrongful imprisonment ratified and adopted by him, though effected or ordered by his servant or agent, without his authority, but for his use or benefit. If, however, a man gives information bonâ fide, or makes a charge bonâ fide against another to a police constable, but leaves the constable

to make inquiry into the circumstances, and act as he may think fit in the matter, he will not be responsible. If a person signs the charge sheet, that is primâ facie evidence that he ordered and directed the arrest, but the presumption arising from that act may be rebutted. (Ad. Torts, 4th ed. 594–7, 605–6. See remarks of Willes, J., in *Austin*, app., *Dowling*, resp., L. R. 5 C. P. 538–9.) **66**

Protection to constables and others by enactment.

By certain statutes, actions cannot be brought against police officers and others for anything done (as they supposed) in pursuance or execution of those statutes, or by virtue of their offices, except in the same county, and within a specified time, and after a certain notice in writing of the cause of action; nor can the plaintiff obtain judgment after tender of sufficient amends before action, or payment of a sufficient sum after action brought and before issue joined. These enactments were intended only for the protection of persons who had some grounds, however mistaken, for supposing they were acting according to the law; and therefore persons who had no ground whatever for supposing they were authorised by these statutes are not entitled to the protection of notice, &c. To entitle them merely to this sort and degree of protection (as distin-

guished from justification), it is not necessary that they should have had reasonable and probable, or even reasonable grounds only, so long as there was not merely a vague supposition that they were acting lawfully, but some fact on which a belief could be based that they were acting within the law. The question for the jury, or if there is no jury, for the judge, is whether the defendant honestly believed in the existence of a state of things, whether reasonably or not, which, if it had existed, would have justified him in doing what he did. If he did so believe, then he was entitled to notice of action. (Ad. Torts, 4th ed. 586–594; *Chamberlain* v. *King*, L. R. 6 C. P. 474; *Leete* v. *Hart*, L. R. 3 C. P. 322.) **67.**

Arrest of a person about to leave England to avoid a demand.

Where the plaintiff in any action in the Supreme Court in which, if brought before the commencement of the stat. 32 & 33 Vict. c. 62, the defendant would have been liable to arrest, proves at any time before final judgment by evidence on oath, to the satisfaction of a judge of such Court, that the plaintiff has good cause of action against the defendant to the amount of fifty pounds or upwards, and that there is probable cause for believing that the defendant is about to quit England unless he

be apprehended, and that the absence of the defendant from England will materially prejudice the plaintiff in the prosecution of his action, such judge may in the prescribed manner order such defendant to be arrested and imprisoned for a period not exceeding six months, unless and until he has sooner given the prescribed security, not exceeding the amount claimed in the action, that he will not go out of England without the leave of the Court. **68.**

Where the action is for a penalty or sum in the nature of a penalty, other than a penalty in respect of any contract, it shall not be necessary to prove that the absence of the defendant from England will materially prejudice the plaintiff in the prosecution of his action, and the security given (instead of being that the defendant will not go out of England) shall be to the effect that any sum recovered against the defendant in the action shall be paid, or that the defendant shall be rendered to prison. (32 & 33 Vict. c. 62, s. 6.) **69.**

Confining a person of unsound mind.

Any individual is authorised to confine a person of unsound mind, who appears likely to do harm to himself or to any other person. (Ad. Torts, 3rd ed. 562.) **70.**

Amount of damages for

The Court never interferes with the dis-

false imprisonment.

cretion of the jury as to the amount of damages for an assault and false imprisonment, unless they are grossly excessive, or clearly founded on a mistaken or improper view of the matter. Any circumstances of aggravation on the one hand, and any circumstances of extenuation, not pleadable as a defence, on the other hand, ought to be taken into account, to increase or lessen the damages. (Ad. Torts, 4th ed. 607–8; Mayne, 263.) **71.**

CHAPTER III.

OF SECURITY TO CHARACTER AND REPUTATION.

ONE of the most precious rights concerning the person, is that of security to character and reputation. This may be injuriously affected by defamation, which is of two kinds; namely, libel and oral slander. **72.**

Two kinds of defamation.

SECTION I.

Of Libel or Written Slander.

Libel is a slander in writing, or in print, or by pictorial or other representation. (Wharton; Starkie on Libel, Introd.; Selw. 1049.) **73.**

Libel defined.

Libel is deemed a greater injury than oral slander, inasmuch as oral slander is sudden and fleeting, whereas libel is deliberate, permanent, and in general propagated farther. Hence, a vague imputation of dishonesty, if oral, is not actionable, unless the imputation had reference to the business of the person

Distinction in effect of verbal and written slander.

defamed, and had the effect of damaging him in it. But such an imputation, if published in writing or in print, even without reference to his business, and without proof of any evil resulting from it, is actionable. (Ad. Torts, 576; Selw. 1049.) **74.**

Publication.

A person libelled will not be entitled to an action, unless the libel be published. But parting with a libellous print or writing in order that it may become known, or the making a libel known to any third person, amounts to a publication. (Broom Com. 719, 729, 730; Selw. 1062.) **75.**

What printed or written publications are libellous.

All written or printed publications which tend to prejudice the private character or credit of another, or to render a person ridiculous or contemptible, or to cause him to be hated, feared, or avoided, or to injure him in his business, are libellous; and an action for damages is maintainable against the writer and publisher, unless the publication is a privileged communication, or the libeller can prove the truth of the libel. (Ad. Torts, 578–9; Broom Com. 718, 719; 3 Ste. Com. 465–8; Selw. 1049; *Walker* v. *Brogden*, 19 C. B. (N. S.) 165.) **76.**

It has been held that a charge of ingratitude is libellous, even though the facts upon which it is founded are stated, but do

not support the charge. (*Cox* v. *Lee*, L. R. 4 Ex. 284.) **77.**

Malice.

Malice is the gist of an action for libel or slander. The word malice may, however, be either used in the popular sense of ill-will, or in the legal general sense of an intention to do a wrongful act; and unless the injurious communication is privileged, the law implies malice in the legal general sense; and though evidence of malice may be given to increase the damages, it is never deemed necessary. In the case of what would otherwise be a privileged communication, actual malice in the popular sense must be proved, in order to support an action. (Ad. Torts, 580; Selw. 1049, 1054, 1062; Rose. 567; *Spill* v. *Maule*, L. R. 4 Ex. (Ex. Ch.) 232; *Davies* v. *Snead*, L. R. 5 Q. B. 608; *Hart* v. *Gumpach*, L. R. 4 P. C. 439, 458–9; *Clark* v. *Molyneux*, L. R. 3 Q. B. D. (Ap.) 237, 246, 247.) **78.**

Privileged communications.

Where a communication is fairly made, in the discharge of some legal or moral duty, or for the necessary protection or investigation of an interest, or upon some other reasonable occasion or exigency, without disbelief of its truth, and without actual malice or gross exaggeration, it is privileged, if it is such as the occasion warrants, and

made to a person who has a corresponding legal or moral duty in receiving it. (Ad. Torts, 580–1, 587–8; Broom Com. 719–721, 724; 3 Ste. Com. 463, 466; Rosc. 570, 574; *Croft* v. *Stevens*, 7 Hurl. & Norm. 570; *Beatson* v. *Skene*, 5 Hurl. & Norm. 838; *Amann* v. *Damm*, 8 C. B. (N. S.) 597; *Whiteley* v. *Adams*, 15 C. B. (N. S.) 392; *Fryer* v. *Kinnersley*, 12 C. B. (N. S.) 422; *Force* v. *Warren*, 15 C. B. (N. S.) 806; *Lawless* v. *Anglo-Egyptian Cotton Co*, L. R. 4 Q. B. 262; *Spill* v. *Maule*, L. R. 4 Ex. (Ex. Ch.) 232; *Dawkins* v. *Lord F. Paulet*, L. R. 5 Q. B. 94; *Davies* v. *Snead*, L. R. 5 Q. B. 608; *Henwood* v. *Harrison*, L. R. 7 C. P. 606, 622, 623; *Hart* v. *Gumpach*, L. R. 4 P. C. 439, 458–9; *Laughton* v. *Bishop of Sodor and Man*, L. R. 4 P. C. 495; *Dickeson* v. *Hilliard*, L. R. 9 Ex. 79; *Clark* v. *Molyneux*, L. R. 3 Q. B. D. (Ap.) 237.) **79.**

But a communication, which would be privileged if made by letter, becomes unprivileged if unnecessarily sent through the telegraph office; because it is communicated to the clerks through whose hands it passes. (*Williamson* v. *Freer*, L. R. 9 C. P. 393.) **80.**

What would otherwise be a privileged

communication may be couched in language so much too strong for the occasion as to afford in itself evidence of actual malice, whereby the privilege is forfeited. But to submit the language of privileged communications to a strict scrutiny, and to hold all excess beyond the formal exigency of the occasion to be conclusive evidence of actual malice, or even sufficient evidence of actual malice to allow the plaintiff to have the question submitted to the jury, would greatly limit, if not altogether defeat, that protection which the law throws over privileged communications. It is sufficient for the purpose of privilege, that the defendant may have honestly believed that everything which he said was true and needful for the exigency of the case, although, in fact, some of his expressions exceeded what was necessary for it. (*Laughton* v. *Bishop of Sodor and Man*, L. R. 4 P. C. 495, 505, 508, 509; *Hart* v. *Gumpach*, L. R. 4 P. C. 460.)

81.

"Upon the question whether an alleged libel is a privileged communication or not, the proper course at a trial is this: the judge is bound to ask the jury whether the matter was published bonâ fide. If they come to the conclusion that it was, then it

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is for the judge to say whether, under all the circumstances, it is or is not a privileged communication." (Lord Chelmsford, in *Stace* v. *Griffith*, L. R. 2 P. C. 428; *Davies* v. *Snead*, L. R. 5 Q. B. 608.) **82.**

Letter as to servant's character.

A letter in answer to inquiries about the character of a servant is privileged in the sense that, although containing defamatory statements, it is not actionable, unless malice is shown; but it is not privileged from production (*a*). (*Webb* v. *East*, L. R. 5 Ex. D. (Ap.) 108.) **82a.**

Letters by a clergyman.

Defamatory letters written and published by a minister of religion, even though under the strongest sense of duty, are not privileged. (Ad. Torts, 584.) **83.**

Defamatory matter in the course of judicial proceedings.

Depositions or statements in the course of a judicial proceeding before a court of competent jurisdiction are privileged. But if false, they may be made a ground of a prosecution for perjury. (Ad. Torts, 581; Rose. 571; *Dawkins* v. *Lord Rokeby*, L. R. 8 Q. B. (Ex. Ch.) 263; affirmed, 7 H. L. 744; *Seaman* v. *Netherclift*, L. R. 1 C. P. D. 540; affirmed, 2 C. P. D. (Ap.) 53.) **84.**

Petitions and memorials complaining of the conduct of public functionaries.

Petitions and memorials to the proper authorities, complaining of the serious misconduct of magistrates and public officers

(*a*) As to false characters of servants, see par. 1093.

and officers of the army or navy, and containing statements honestly believed to be true, are privileged communications. (Ad. Torts, 582; Rosc. 571.) **85.**

Charge of a bishop.

The charge of a bishop is a privileged communication as delivered; and it is also privileged as sent to a newspaper, if it be needful that it be generally circulated. (*Laughton* v. *Bishop of Sodor and Man*, L. R. 4 P. C. 495.) **86.**

Letters to a bishop.

Letters imputing grave misconduct to clergymen, addressed to the bishop of the diocese, are privileged, if sent bonâ fide for the purpose of obtaining an inquiry into the matter by the bishop. (Ad. Torts, 585; Selw. 585.) **87.**

Communications between friends.

If a confidential communication is honestly made between relatives or friends, purely to prevent an injury, it is privileged. (Ad. Torts, 585–6; Rosc. 567, 571–2.) **88.**

Reports of legal proceedings.

"A fair account of what takes place in a court of justice is privileged." (See judgment in *Wason* v. *Walter*, L. R. 4 Q. B. 73, 87, 88.) But a report of proceedings in a court of justice is not privileged, though it be true, if sent by a person who is not a reporter for a newspaper, and from a malicious motive. (*Stevens* v. *Sampson*, L. R. 5 Ex. D. (Ap.) 53.) **89.**

In some instances, the reports of legal proceedings have been held to be actionable: as in the case of statements of counsel unsupported by evidence; or untrue, unfair, or exaggerated accounts, published after a trial is concluded; or disparaging comments, allegations, and opinions of the reporter himself, or of any person other than one whose duty required him to make them; or matters of a grossly scandalous, blasphemous, or indecent nature. (Ad. Torts, 592; Broom Com. 727–8; Selw. 1052; Rosc. 474.) **90.**

Information for members of Parliament.

Information printed merely for the use of members of Parliament is privileged, so far as its circulation is confined to them. (Ad. Torts, 594.) **91.**

Speeches of members of Parliament.

A member of Parliament when speaking in his place, may freely remark upon the character of others; but he will be responsible in damages if he prints and publishes speeches of a libellous nature. (Ad. Torts, 594; Broom Com. 728; Selw. 1052; Rosc. 571.) **92.**

Comments thereon.

A faithful report in a public newspaper of a debate in Parliament is not actionable: nor are comments thereon in such newspaper, if made in an honest and fair spirit. (*Wason* v. *Walter*, L. R. 4 Q. B. 73.) **93.**

Reports of public meetings.

Those who print and publish what passes at public meetings are responsible for any defamatory matter. (Ad. Torts, 594; Broom Com. 728–9; Selw. 1053; Rosc. 575.) **94.**

The administration of the poor laws, or other public matters, whether by the Government department or by the local authorities, including the conduct of the medical officers, or other important public officers, is a matter of public interest. But the publication of a report of proceedings at a meeting of poor law guardians, or any other local body which is not obliged to sit in public, and at which ex parte charges of misconduct against a medical officer or other person were made, is not privileged. (*Purcell* v. *Sowler*, L. R. 2 C. P. D. (Ap.) 215.) **95.**

Criticisms and comments.

Fair and candid criticism, however severe, on a book, or a paper, or a work of art, or an entertainment, is allowable; but if the comment is malevolent, and exceeds the bounds of fair opinion, it is actionable. (Ad. Torts, 594–5; Broom Com. 727; Selw. 1050–1; Rosc. 575.) **96.**

Fair criticism upon a matter of public interest is privileged, and is not the subject of an action, unless the plaintiff can establish actual malice. (*Henwood* v. *Harrison*, L. R. 7 C. P. 606, 608, 625–6.) **97.**

And fair and bonâ fide comments upon persons attending a parliamentary election meeting may be made in a newspaper. (*Davis* v. *Duncan*, L. R. 9 C. P. 396.) **98.**

Fair comments on the public acts of public men are allowable. But if comments on public men are made a medium for private malice or exceed the bounds of fair criticism, as by falsely imputing improper motives, even in the belief of such motives having existed, they are actionable. (Ad. Torts, 596; Broom Com. 727; Rosc. 562; Selw. 1055; *Campbell* v. *Spottiswoode*, 3 Best & Sm. 769; *Kelly* v. *Tinling*, L. R. 1 Q. B. 699.) **99.**

To be privileged, it is not necessary to show either that the person of whom the defamatory matter is written was a person whose position and character are of general interest to the whole country; or that the subject-matter dealt with is one of general interest to the whole country. It is enough to show that he fills a public character of a limited kind and in a limited district, or that the subject-matter dealt with is a matter of interest only to a small portion of the public, or to the public in a limited district, and not a matter of general public interest. (*Purcell* v. *Sowler*, 2 C. P. D. (Ap.) 215, overruling the decision of the Common

Pleas Division as regards the principles, though affirming the decision of the particular case.) **100.**

Duty of a printer.

If a printer discovers that he is printing libellous matter, he ought at once to stop; and he may then, but not otherwise, recover his charges. (Ad. Con. 419; Chit. Con. 517.) **101.**

SECTION II.

Of Verbal Slander.

Scandalum magnatum.

Certain words are actionable in the case of a peer spiritual or temporal or a great officer of state, which could not be deemed so in the case of an ordinary person. (Selw. 1253.) **102.**

Vituperation.

Mere abuse by word of mouth, however gross, is not actionable per se, that is, without allegation and proof of special damage, unless it amounts to scandalum magnatum, or it is spoken of a person in reference to his profession or business, or unless it imputes an indictable offence. (Ad. Torts, 597–9; Selw. 1253–5; Rosc. 569; *Irwin* v. *Brandwood*, 2 Hurl. & Colt. 960.) **103.**

Where the

Words of mere suspicion, opinion, inquiry,

advice, warning, or real regret, will not create any cause of action, if the circumstances rebut the presumption of malice. (Ad. Torts, 598; 3 Ste. Com. 466; Rosc. 572–4. See par. 113.) **104.**

circumstances rebut presumption of malice.

Truth of the charge.

And where the charge is true, that, if pleaded, will prevent the plaintiff recovering damages; because the law will not give a man damages in respect of an injury to a character which he either does not possess or ought not to possess. But the uttering wrongfully or maliciously slanderous matter, though true, will subject a man to an indictment. (Selw. 1266; Blackburn, J., in *Watkin* v. *Hall*, L. R. 3 Q. B. 400.) **105.**

Imputation of heresy, adultery, or unchastity.

Words imputing heresy to a layman, or adultery, or unchastity, are not actionable per se (!), except that by the custom of London an action may be maintained in the city Courts for imputing unchastity to a woman. (3 Ste. Com. 464–5; Selw. 1255; Ad. Torts, 599; *Allsop* v. *Allsop*, 5 Hurl. & Norm. 534; *Lynch* v. *Knight*, 9 H. L. Cas. 577; *Roberts* v. *Roberts*, 5 Best & Sm. 384.) **106.**

Words actionable on account of some special damage.

It is to be observed, however, that these and other defamatory words are actionable where the plaintiff alleges and proves some special damage to have resulted from them,

as a natural and ordinary consequence. The loss of the hospitality of friends is such a special damage. But illness is not to be deemed a natural and ordinary consequence of slanderous words, so as to constitute such special damage. (3 Ste. Com. 464, 465; Ad. Torts, 597-612; Selw. 1259, 1260; *Allsop* v. *Allsop*, 5 Hurl. & Norm. 534; *Lynch* v. *Knight*, 9 H. L. Cas. 577; *Davies* v. *Solomon*, L. R. 7 Q. B. 112.) **107.**

Imputation of a contagious disease.

To affirm that a person has a contagious disease, the imputation of which may exclude him from society, is actionable. (Ad. Torts, 598–9; 3 Ste. Com. 465; Selw. 1254.) **108.**

Words injurious to a man in his profession or business.

Words spoken of a professional man or a tradesman, in reference to his profession or business, imputing misconduct or gross ignorance or incapacity, and calculated to injure him in it, are actionable. (Ad. Torts, 598; 3 Ste. Com. 465; Selw. 1254.) **109.**

Words directly tending to injure a clergyman in his profession, and to subject him to a loss of emolument, are actionable. (Ad. Torts, 600.) **110.**

Words are actionable where they impute to a person holding some office or employment, some specific misconduct or unfitness in connection with such office or employment. If they amount only to a vague im-

putation of general misconduct or unfitness for his situation, they will fail to support an action without the proof of special damage. (Ad. Torts, 600; Selw. 1258; *Irwin* v. *Brandwood,* 2 Hurl. & Colt. 960; *Foulger* v. *Newcomb,* L. R. 2 Ex. 327; *Watkin* v. *Hall,* L. R. 3 Q. B. 396.) **111.**

Repetition of a slander.

If any special damage has resulted, or is likely to have resulted, immediately and naturally from the utterance of slanderous words, an action for damages is then maintainable, even though the utterer was not the author of the scandal, but merely repeated what he had heard. But the original utterer of slanderous words is not responsible in damages for the subsequent repetition of them, except by persons who had an authority from him to repeat them, or were under an obligation to do so. (Ad. Torts, 601–4; *Dixon* v. *Smith,* 5 Hurl. & Norm. 450; Rosc. 576; *Parkins* v. *Scott,* 1 Hurl. & Colt. 153; *Watkin* v. *Hall,* L. R. 3 Q. B. 396.) **112.**

Slanderous imputation in answer to inquiry.

A person may be responsible for a slanderous imputation, though made in the belief of its truth, in answer to an inquiry. (Ad. Torts, 604; *Force* v. *Warren,* 15 C. B. (N. S.) 806. See par. 104.) **113.**

Malice in ordinary

We have seen (par. 79–100) that many

cases, and in the case of privileged communications.

communications of a defamatory nature are privileged, even when by way of libel. And, à fortiori, many such communications are privileged when they are merely oral. But although the making of a charge may be justified by the occasion, yet it may be accompanied by such expressions, and may be made under such circumstances, as furnish proof of actual malice, in the popular sense, and in such case it will be actionable. (Ad. Torts, 605; Selw. 1254, 1266–7; *Davies* v. *Snead*, L. R. 5 Q. B. 608; *Clark* v. *Molyneux*, L. R. 3 Q. B. D. (Ap.) 237, 246–7.) **114.**

In ordinary actions for slander, malice, that is, malice in the legal sense, is (in the absence of evidence to the contrary) presumed from the publishing the slanderous matter. But in the case of what would otherwise be privileged communications, actual malice must be proved in order to render them actionable. (Selw. 1254; Rosc. 567; *Watkin* v. *Hall*, L. R. 3 Q. B. 396; *Spill* v. *Maule*, L. R. 4 Ex. (Ex. Ch.) 232; *Davies* v. *Snead*, L. R. 5 Q. B. 608; *Henwood* v. *Harrison*, L. R. 7 C. P. 626; *Hart* v. *Gumpach*, L. R. 4 P. C. 439, 458–9; *Laughton* v. *Bishop of Sodor and Man*, L. R. 4 P. C. 495.) **115.**

Communications

Defamatory statements are privileged, if

bonâ fide made, on an inquiry into a supposed crime. (Ad. Torts, 605.) **116.**

made in prosecution of crime.

Liberty of advocates.

Counsel or solicitors when acting as advocates may make any calumnious imputation which is relevant to the circumstances before the Court, and which such circumstances, even though untrue, appear to warrant. But they ought not maliciously to utter words wholly unjustifiable. (Ad. Torts, 605; *Mackay* v. *Ford*, 5 Hurl. & Norm. 792; remarks of Lord Coleridge, C.J., in *Seaman* v. *Netherclift*, L. R. 1 C. P. D. 545.) **117.**

Liberty of judges, magistrates, counsel, witnesses, and parties.

Judges and magistrates are not responsible for defamatory expressions uttered by them, with reference to a cause or matter in issue before them. (Ad. Torts, 607; *Scott* v. *Stansfield*, L. R. 3 Ex. 220; *Dawkins* v. *Lord Rokeby*, L. R. 8 Q. B. (Ex. Ch.) 255, 263; affirmed, 7 H. L. 744.) **118.**

Indeed, it is observed by Kelly, C.B., in *Dawkins* v. *Lord Rokeby*, L. R. 8 Q. B. 263, "the authorities are clear, uniform, and conclusive, that no action of libel or slander lies, whether against judges, counsel, witnesses, or parties, for words written or spoken in the ordinary course of any proceeding before any Court or tribunal recognised by law, even though falsely and maliciously spoken." Lord Wynford, however, in *Allardice* v.

Robertson, 1 Dow. (N. S.) 495, 515, held that judges of inferior Courts are liable to an action, if malice is proved. And if a witness uses defamatory expressions before he has got into the witness-box, or after he has left it, he would be liable to an action for slander. And if he uses such expressions, even when in the witness-box, he may be so liable, if they are not made with reference to the subject of inquiry. (*Seaman* v. *Netherclift*, L. R. 2 C. P. D. 53.) **119.**

SECTION III.

General Observations.

Interpretation of slanderous expressions.

In actions for defamation, words are now construed according to their proper meaning; and that meaning, and not the meaning of the person uttering them, is the test of their being actionable. (Ad. Torts, 607; Selw. 1256.) **120.**

Damages for libel.

The jury may give damages not only in respect of any loss arising from the libel, but also for the mental suffering caused to the person libelled. And any damages may be given which are not manifestly outrageous. (Ad. Torts, 627; Mayne, 273.) **121.**

Setting up libel by plaintiff.

One libel cannot be set up against another as a defence; nor can it be set off in reduction of damages, unless the libel by the plaintiff may be regarded as the provoking cause of the libel by the defendant. (Ad. Torts, 628; Rosc. 577; Mayne, 281.) **122.**

Apology.

If the defendant offered an apology, it may be given in evidence in mitigation of damages. (Ad. Torts, 628–9; Broom Com. 721; Rosc. 577.) **123.**

Usual course in actions for libel.

The judge usually gives a definition of libel, and then leaves it to the jury to say whether the facts necessary to constitute the offence so defined are proved. And the judge may, if he thinks fit, give his own opinion, as a matter of advice to the jury. (Ad. Torts, 629; Broom Com. 730–1; Rosc. 562.) **124.**

The question of privilege is a question of law for the judge, and not a question for the jury. (*Henwood* v. *Harrison*, L. R. 7 C. P. 628.) **125.**

CHAPTER IV.

OF EXEMPTION FROM PERSONAL ANNOYANCE GENERALLY.

BESIDES corporal security, corporal liberty, and security to character and reputation, everyone has an inherent right to an exemption from vexatious annoyance generally. Under this head it may suffice to mention one form of vexatious annoyance, namely, that of malicious proceedings at Law. **126.**

Action for malicious prosecution or malicious arrest.

A person is liable to an action if he puts the criminal law in motion before a Court or a judicial officer, or causes a search warrant to issue, or an action to be brought in the name of a third person, a pauper or insolvent who could pay no costs, or an execution for an excessive amount, or if he causes the detention of a judgment debtor, maliciously and without reasonable or probable cause for such a proceeding. **127.**

Malice may be either express or actual, or be only implied or constructive. For malice is not confined to spite. It includes any

motive other than that of simply bringing an offender to justice. **128.**

Malice must be combined with want of reasonable and probable cause. Neither will suffice without the other; so that if a man is actuated by the most flagrant malice, yet if there was reasonable and probable cause for the prosecution, he will be entitled to judgment in such an action. Want of reasonable and probable cause cannot be implied from the most express malice. But malice (in the technical sense of an intention to do a wrongful act) is ordinarily implied from the absence of reasonable and probable cause; and even if there was such cause, yet if the defendant did not know it, or did not believe that the plaintiff was guilty, malice may be inferred. (Ad. Torts. 4th ed. 613–634; Broom Com. 715–717; Selw. 1071–3, 1079, 1080; Rosc. 12th ed. 771–2; *Austin*, app., *Dowling*, resp., L. R. 5 C. P. 534; *Gilding* v. *Eyre*, 10 C. B. (N. S.) 592.) **129.**

If a defendant maliciously and without reasonable and probable cause, has made statements before a magistrate, in order to induce, and has induced him to issue a warrant for the apprehension of the plaintiff, the defendant is responsible. (Ad. Torts, 4th ed. 618, 619.) **130.**

The facts (such as the conduct, belief, and motives of the parties) must be left to the jury (if there is one): but whether the facts found constitute reasonable and probable cause, must be determined as a matter of law by the judge, and not by the jury. (*Lister* v. *Perryman*, L. R. 4 H. L. 521, 538–9; Ad. Torts, 4th ed. 631–2; Rosc. 12th ed. 771–3; and see supra, par. 64.) **131.**

"The onus of showing that there was not reasonable and probable cause, rests, in the first instance, on the plaintiff. It is no doubt a negative, but it is a negative essential to the plaintiff's case; and the defendant is entitled to the benefit of the plaintiff's failure to establish that negative." (Lord Colonsay, in *Lister* v. *Perryman*, L. R. 4 H. L. 542.) **132.**

There are no rules or principles as to what constitutes reasonable and probable cause. Each case depends on its own merits, and the opinion of the judge who tries it. (*Lister* v. *Perryman*, L. R. 4 H. L. 521.) **133.**

As to reasonable and probable cause grounded on hearsay evidence, it may perhaps be accurately laid down thus: that a person may have reasonable and probable cause, though he may have proceeded on hearsay evidence of another, if such other

person appeared trustworthy, and if such hearsay evidence be a reasonable amount of credible information stated to have been given to such other person by a third person who appeared trustworthy, and to be speaking as to his own knowledge. (See remarks in *Lister* v. *Perryman*, L. R. 4 H. L. 521.) **134.**

An abandonment of the prosecution, or an acquittal for want of evidence, is not of itself any proof of malice or of the want of reasonable or probable cause. (Ad. Torts, 4th ed. 632.) **135.**

If the plaintiff was convicted, he cannot obtain judgment, even though there was by law no appeal against the conviction. Indeed, in order to recover damages for a malicious prosecution or arrest, the plaintiff must show that the proceeding was determined in his favour, though he may not have been actually acquitted, and that he suffered in person, in reputation, or in point of expense. (Ad. Torts, 4th ed. 620, 628, 633; Rose. 12th ed. 770; Selw. 1073; Broom Com. 717; Mayne, 259; Rose. 579, 584; *Basébé* v. *Matthews*, L. R. 2 C. P. 684.) **136.**

In the same case, there may be both wrongful imprisonment and malicious prosecution, or either may exist without the other.

When they both exist, an action may be brought in respect of them. Wrongful imprisonment begins when the party is in custody of a ministerial officer, until he is brought before a Court or a judicial officer. Malicious prosecution begins when he is brought before a Court or judicial officer. (Ad. Torts, 4th ed. 618; *Austin*, app., *Dowling*, resp., L. R. 5 C. P. 534.) **137.**

Maliciously petitioning for an adjudication in bankruptcy

A person who petitions for an adjudication in bankruptcy maliciously and without reasonable or probable cause, and knowingly and wilfully or recklessly swears to depositions false in fact, is liable to an action for a malicious prosecution, if the proceedings were superseded or set aside before the commencement of the action. (Ad. Torts, 4th ed. 623–4; Broom Com. 715; Selw. 1077; Rosc. 584.) **138.**

PART II.

OF PRIVATE RIGHTS AND WRONGS CONCERNING THE SUBJECTS OF PROPERTY, AS COGNISABLE AT COMMON LAW.

TITLE I.

OF CONTRACTS GENERALLY.

Promise distinguished from a contract.

A PROMISE, as distinguished from a contract, is an engagement by one person to another, made by the former voluntarily and independently of any concurrence on the part of the latter. (2 Ste. Com. 53–4; Chit. Con. 2.) **139.**

Definition of a contract.

A contract is an agreement, that is, a promise made on one side, and assented to on the other. **140.**

Unilateral and bilateral contracts

A contract may be either unilateral, that is, binding upon one side only, or bilateral (or inter partes), that is, binding on both sides. (2 Ste. Com. 53–4; Chit. Con. 13, 14; Broom Com. 252, 269; Ad. Con. 1, 2, 14, 212.) Thus, if a person sends in a tender to supply such goods as another may order, and the latter gives an order, the order is a sufficient consideration for the promise to supply the goods, although there be no binding contract on the other side to order any goods. (*Great Northern Ry. Co.* v. *Witham*, L. R. 9 C. P. 16.) **141.**

PART II. TIT. I.

Express and implied contracts.

A contract may be either express or implied. An express contract is one the terms of which are expressed. An implied contract is one which the law, on principles of reason and justice, presumes. Thus, if a person sends to a shop for goods, or employs another, the law implies a contract by him to pay a reasonable sum for the goods, or the ordinary remuneration to him who is so employed. And so, on the loan of a horse, there is an implied contract by the borrower to feed him. (Broom Com. 252–4; 2 Ste. Com. 56; Ad. Con. 17, et seq.) **142.**

And when an act injurious to a third person, but not apparently illegal, is done by one person at the request of another, a promise by the latter to indemnify the person doing it may be inferred. (*Dugdale* v. *Lovering*, L. R. 10 C. P. 196.) **143.**

Executed and executory contracts.

A contract may be either executed or executory, or executed as to one of the parties, but executory as to the other. An executory contract is one in which a person binds himself to do or not to do a particular thing. An executed contract is one in which the main object of contract has been actually performed. (See Broom Com. 253; 2 Ste. Com. 57.) **144.**

Further

Again, contracts may be, 1. Contracts by

division of contracts.

matter of record; 2. Contracts under seal, which are termed specialties; 3. Contracts not under seal, which are called simple contracts. (Sm. Con. 2; Ad. Con. 2; Broom Com. 261–2.) **145.**

Contracts of record.

Contracts by matter of record are contracts which are founded on the authority of a Court of Record. Unless judgments be regarded as contracts of record, as they are by some writers, contracts of record are seldom used, with the exception of cognovits and recognisances. (Sm. Con. 3; Broom Com. 261; Ad. Con. 2; Chit. Con. 2.) **146.**

Cognovit.

A cognovit is a written confession of an action to which the defendant has no available defence, supposed to be given by the defendant in Court, and authorising the plaintiff, under certain circumstances, to enter up judgment, and issue execution thereon against the defendant. **147.**

Recognisance.

A recognisance is an obligation of record, entered into, either to the Crown or a subject, before some Court of Record or magistrate duly authorised, with condition to do some particular act. (Broom Com. 261; Wharton.) **148.**

Characteristics of contracts of record.

Contracts of record have this peculiarity, that they prove themselves, *i.e.*, the bare

PART II. TIT. I.

production of the record is sufficient evidence of the existence of the contract. They require no consideration to render them binding. And they may be enforced by scire facias. (Sm. Con. 3, 4; Ad. Con. 2; Chit. Con. 3.)

149.

Contracts under seal. Their characteristics.

A contract under seal is a written or printed contract sealed and delivered as a deed. Such a contract, unless operating in restraint of trade, requires no consideration to support it, as between the parties to it, if it is a deed inter partes, or as between the obligor and obligee, if it is a bond. It will be binding on the heir and the devisee of the covenantor or obligor, where the heir is named in the covenant or bond, and takes assets by descent. And it can only be discharged by that which is of as high a nature as itself, that is, by a deed, or by a judicial or legislative act. (Broom Com. 272, 293, 297; Sm. Law of Prop., par. 2241, 1812, 1825, 5th ed.; Ad. Con. 2, 977; Chit. Con. 3, 5, 7, 598, 688; Sm. Con. 127–8.) **150.**

Simple contracts.

A simple contract is a contract by writing not under seal, or by word of mouth, or by implication from conduct. (Sm. Con. 32, 34; Ad. Con. 3; Chit. Con. 4; Broom Com. 303.)

151.

Their characteristics.

Simple contracts, even though they be in

writing, differ from contracts under seal in all these particulars: They do not create an estoppel, except in some few cases, though they operate as an admission, which serves as presumptive evidence. They require a consideration to support them. They form no ground of action against the heir or devisee, even though he be expressly named in them, but bind the personal representative. And they may be discharged without a deed, judgment, or Act of Parliament. (Sm. Con. 34, 127–8; Broom Com. 272, 421–2; Ad. Con. 3–5; Chit. Con. 5–7.) **152.**

Merger of simple contracts.

If, after a simple contract security is given, a security by specialty between the same parties is given in relation to the same subject-matter, the right of action on the former becomes merged in the right of action on the latter, if the remedy by the latter is co-extensive with the remedy by the former, except, perhaps, where there is an intention expressed on the face of the deed, that the previous security should remain in force. (Broom Com. 278–282; Sm. Con. 23; Chit. Con. 6, 697–8; Ad. Con. 922; *Sharpe* v. *Gibbs*, 16 C. B. (N. S.) 527; *Boaler* v. *Mayor*, 19 C. B. (N. S.) 76.) **153.**

Parol agreement.

Although the word "parol" is often used to signify that which is oral, as opposed to

that which is written, yet the expression "parol agreement" or "parol contract" is used to denote an agreement, whether written or verbal, which is not by specialty, that is, not by deed. (See Broom Com. 370; 2 Ste. Com. 54; Chit. Con. 4.) **154.**

Requisites to a contract. Terms must be definitely settled.

No particular form of words is necessary in a contract, whether it be verbal or written. So that an agreement may be inferred from mere words of recital, reference, exception, proviso, or condition. But in order to constitute the foundation of a legal right, the terms of a contract must be definitely and completely arranged; except that it is not essential in all cases to specify the time of delivery, the mode or time of payment, or even the price itself. (Broom Com. 303–5; Rosc. 15; Chit. Con. 64, 66, 86, 87; *Joyce* v. *Swann*, 17 C. B. (N. S.) 84.) And the quantity may be expressed by such words as "say about," &c., and, per se, these words denote words of expectation and estimate only, and not words amounting to a warranty. (*McConnel* v. *Murphy*, L. R. 5 P. C. 203, 217, 218.) **155.**

Mutual assent necessary.

As already intimated, in every contract, whether unilateral or inter partes, there must also be a mutual assent, express or implied; for a mere promise by one person

for the benefit of another, without any assent or acceptance, is not a binding contract. And the assent must be to the same thing and to the precise terms offered; so that where one party makes a proposal, and the other accepts, subject to some variation or condition, the former is not bound by the acceptance. (Sm. Con. 120–2; Broom Com. 255; 2 Ste. Com. 53, 54; Ad. Con. 15, 16; Chit. Con. 8, 13, 14; *Appleby* v. *Johnson*, L. R. 9 C. P. 158.)

156. An offer may be withdrawn at any time before it is completely and unconditionally accepted by words or by conduct, even though the person making it expressly gave the opposite party a certain time to consider whether he would accept it. But it cannot be withdrawn after it is so accepted. (Sm. Con. 123; Ad. Con. 15, 16; Rosc. 354.)

Rescission of an offer.

157. The contract is complete as soon as a letter containing an acceptance of a proposal is posted, though it may never reach its destination. (Broom Com. 305; Ad. Con. 16; Rosc. 354.)

Posting letter of acceptance.

158. By the 4th section of the Statute of Frauds, 29 Car. II. c. 3, no action shall be brought— (1) upon a promise by an executor or administrator to answer damages out of his own

Where the contract must be in writing; signed.

estate; or (2) upon any promise to answer for the debt, default, or miscarriage of another; or (3) upon an agreement made in consideration of marriage (which does not apply to promises to marry); or (4) upon a contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them; or (5) upon any agreement not to be performed within the space of a year after the making thereof—unless the agreement upon which the action is brought, or some memorandum or note thereof, is in writing, and signed by the party to be charged therewith, or some other person by him lawfully authorised. (Broom Com. 375, 386; Sm. Con. 64, 67; Ad. Con. 47–64; Chit. Con. 65, 66; *Caton* v. *Caton*, L. R. 2 H. L. 127; *Horsey* v. *Graham*, L. R. 5 C. P. 9.)(*a*). **159.**

A proposal in writing, signed by the party to be charged, and accepted without writing by the party to whom it is made, is a sufficient memorandum or note of an agreement to satisfy the 4th section of the Statute of Frauds. (*Reuss* v. *Picksley*, L. R. 1 Ex. (Ex. Ch.) 342.) **160.**

(*a*) For the 17th section of the Statute of Frauds, as to sale of goods, see infra, par. 524.

If a person sanctions or adopts his written or printed name or signature, that is a sufficient signature by an agent duly authorised. (Ad. Con. 63.) **161.**

The consideration, as well as the parties, and the subject-matter of an agreement, must appear by express terms in writing, or by necessary implication from a written instrument, in each of the five cases to which the 4th section of the Statute of Frauds relates, except the second case, namely, of a guarantee, in which, in consequence of another enactment, the consideration may be proved orally; and except that, if no price was agreed on, the law will infer that a reasonable price was to be paid. (Broom Com. 376–7, 380–1; Ad. Con. 61; Chit. Con. 63–4; 19 & 20 Vict. c. 97, s. 3; *Joyce* v. *Swann*, 17 C. B (N. S.) 102.) **162.**

The 4th clause of the 4th section of the Statute of Frauds applies to any agreement for or relating to the alienation of an interest in land. (See Broom Com. 387; Ad. Con. 47–50; Chit. Con. 274–5.) But it does not apply to a distinct collateral agreement connected therewith. (*Angell* v. *Duke*, L. R. 10 Q. B. 174.) **163.**

Executory contracts for the letting and

hiring of furnished lodgings by the month, week, or day, are within this clause. (Ad. Con. 48.) **164.**

A contract for the sale of grass, wood, or fruit, as growing produce, is a contract for the sale of an interest concerning land. But a contract for the sale of grass, wood, or fruit, when severed, or by the terms of the contract intended to be at once or immediately severed, from the freehold, or of other produce not arising spontaneously, but by labour and industry, whether growing or severed, is not a contract for the sale of an interest concerning land. (Sm. Con. 97–8; Ad. Con. 50–1; Broom Com. 388–9; Rosc. 241; *Marshall* v. *Green*, L. R. 1 C. P. D. 35.) And a contract for the use of a dock for the repair of a vessel, without excluding the possession and control of the dock owners, is not within the Act. (*Wells* v. *Kingston-upon-Hull*, L. R. 10 C. P. 402.) **165.**

Tenants' fixtures are not an interest in land within the 4th section; nor are they goods and chattels within the 17th section. (*Lee* v. *Gaskell*, L. R. 1 Q. B. D. 700.) **166.**

By the 2nd section of the Statute of Frauds, leases for not more than three years, at a rent of not less than two thirds of the

improved value, are excepted from the 1st section, which requires leases to be in writing; but yet, in consequence of the 4th section, an *agreement* for such a lease cannot be enforced unless it is in writing. (Sm. Con. 102; Broom Com. 387; Ad. Con. 48.)

167.

The last branch of the 4th section of the Statute of Frauds applies only to agreements that cannot be completely performed within the year, or are not on the face of them contemplated to be so performed. It does not apply to an agreement which may or may not happen to be performed within the year; nor to an agreement which is to be completely performed within the year by one of the parties, though not by the other; nor to an agreement for the payment of a yearly sum, in consideration of the performance of duty or service year by year (such as the maintenance of children) where such duty or service has been performed for a considerable period. (1 Sm. L. C. 283; Sm. Con. 104–7; Broom Com. 391–2; Ad. Con. 57–8; Rosc. 355; Chit. Con. 69; *Knowlman* v. *Bluett*, L. R. 9 Ex. 1; (Ex. Ch.) 307; *Banks* v. *Crossland*, L. R. 10 Q. B. 97.)

168.

By the statute 9 Geo. IV. c. 14, s. 1, in

actions of debt or upon the case, grounded upon any simple contract, no acknowledgment or promise will take a case out of the Statute of Limitations (21 Jac. I. c. 16), unless made or contained by or in writing signed by the party chargeable thereby. But by the statute 19 & 20 Vict. c. 97, s. 13, it is sufficient if the writing is signed by his agent duly authorised. (2 Ste. Com. 55–6; Chit. Con. 741–2; Ad. Con. 1006; Rosc. 460.) **169.**

By the statute 9 Geo. IV. c. 16, s. 5, no action shall be maintained to charge any person, upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification after full age of any promise or simple contract made during infancy, unless by writing signed by the party to be charged thereby. (2 Ste. Com. 55–6; Rosc. 451; Chit. Con. 148; Ad. Con. 942.) And now by the statute 37 & 38 Vict c. 62, the protection to infants is further extended. (See Appendix.) **170.**

A writing is also required in the case of grants of annuities (53 Geo. III. c. 141), and the sale or transfer of ships (17 & 18 Vict. c. 104, s. 55), and the sale or assignment of copyright. (Chit. Con. 63.) **171.**

Verbal assent to an alteration.

The assent to a substituted mode of performing one of the terms of a contract need not be in writing, though the original contract must have been in writing. (*Leather Cloth Co.* v. *Hieronimus*, L. R. 10 Q. B. 140.)

172.

Three ingredients in a simple contract.

In a simple contract, even though it be in writing, there must have been, 1. A consideration moving from the contractee, or some one influenced by him, to the contractor. 2. A request to the contractee, by the contractor, to do, or induce some one else to do, the thing constituting the consideration. 3. A promise to the contractee, by the contractor, grounded on such consideration. (Broom Com. 308, 317, 331–2; 2 Ste. Com. 58–61; Sm. Con. 137, 164; Chit. Com. 8, 16; Ad. Con. 7.) But as we shall presently see, the request and the promise are sometimes implied by the law.

173.

What amounts to a consideration.

A consideration capable of supporting a simple contract may consist of any benefit to the person making the promise, however slight, or to a third person, by the act of the promisee, or any loss, trouble, detriment, or inconvenience to, or charge or liability upon, the promisee, however slight, for the sake or at the instance of the promisor, though

without any benefit to the promisor. The Courts of Law did not enter into the question of the adequacy of the consideration for a promise. (Broom Com. 316, 319; Sm. Con. 135, 138; Ad. Con. 3, 8, 9, 17; 2 Ste. Com. 57–8; Chit. Con. 19, 20, 21, 36; Byles, 114, 115.) Indeed, even in Equity, mere inadequacy of price, or any other inequality in the bargain, does not constitute by itself a ground to avoid it. Still, however, there may be such an unconscionableness or inadequacy in the bargain, as to shock the conscience, and amount to conclusive evidence of imposition or some undue influence; and in such a case, Courts of Equity would interfere on the ground of fraud. And where there are other ingredients of a suspicious nature, gross inadequacy must furnish the most vehement presumption of fraud. (Sm. Eq. Manual, 13th ed., par. 122, 123.) And if the consideration is false or a nullity, the contract is void, both at Law and in Equity. (Ad. Con. 7.) **174.**

Prevention of litigation and settlement of disputes is a sufficient consideration. So that the suspension or forbearance of proceedings at Law or in Equity in respect of a legal or equitable claim, though it be only a

doubtful one, and though, indeed, it ultimately turns out to be wholly unfounded, is a sufficient consideration for a promise, either by the party liable or by any third person, provided the claim was made bonâ fide in the belief that it was well founded, and not fraudulently. (Sm. Con. 146–7, 150; Ad. Con. 12; Chit. Con. 24–9; *Cook* v. *Wright*, 1 Best & Sm. 559; *Keenan* v. *Handley*, 2 D. J. & S. 283; *Callisher* v. *Bischoffsheim*, L. R. 5 Q. B. 449; *Harris* v. *Venables*, L. R. 7 Ex. 235; *Chartered Bank of India, &c.* v. *Henderson*, L. R. 5 P. C. 501.) **175.**

The consideration of natural affection or a mere moral consideration, however strong, is not such a consideration as will support a contract. And it has been held (most improperly as the writer submits) that previous seduction is not a sufficient consideration to support a parol promise, whether written or verbal. (Sm. Con. 163; Selw. 45, 52–3; 2 Ste. Com. 60; Ad. Con. 5, 11; Chit. Con. 19, 40.) **176.**

If a person promises to do, or does, that which he was previously bound to do, it is not a sufficient consideration for a promise made to him. A promise, even in writing, to pay a debt already incurred by a third person to the promisee is not enforceable,

unless made on a new consideration, such as the promisee's forbearance. And a promise by a creditor to accept less than the amount ascertained to be due, or to give time, is void, unless there is some new consideration. (Chit. Con. 43, 44; Ad. Con. 5, 6, 12; see *Scotson* v. *Pegg*, 6 Hurl. & Norm. 295; *Brown* v. *Brine*, L. R. 1 Ex. D. 5.) **177.**

From whom the consideration must move.

In reference to the consideration, there must be a privity, *i.e.*, a connection as regards the transaction to which the contract relates, between the plaintiff or party charging and the defendant or party charged. So that the consideration must proceed from the party to whom the promise is made, or from a third person moved or affected by him; and no stranger to the consideration can sue upon the contract, although made for his benefit, and however nearly related he may be to the promisee from whom the consideration moved. And hence it has been held that where the consideration moves from a father, and the promise is made to the father, and the son is not a party to the contract, though it is made for his benefit, the natural love and affection between the father and son will not give the son the right to sue as if the consideration had proceeded from himself. (2 Ste. Com. 60, 61;

Sm Con. 137; Broom Com. 317; *Tweddle* v. *Atkinson*, 1 Best & Sm. 393.) **178.**

Considerations executed, executory, contemporaneous, or continuing.

Considerations may be executed, or they may be executory, contemporaneous, or continuing. An executed consideration is one which has already taken place; an executory consideration is one which is to take place. A contemporaneous or concurrent consideration is one which is contemporaneous with a promise made in consequence of it, or one which arises where two persons simultaneously and reciprocally promise to do certain things; the promise of the one party being the consideration for the promise of the other; in which case the contract is perfected and made binding by the mere consent of the parties. A continuing consideration is one which, though commenced at a past time, continues to subsist at the date of the contract. **179.**

In the case of contracts made between adults, and founded upon mutual promises, mutuality of obligation is essential. **180.**

Necessity for a request.

An executed consideration, in order to support an action, must be founded on a previous request, expressed or implied, to the contractee by the contractor, to do the act constituting the consideration; for it would not be right to place another under

a legal obligation grounded on a mere gratuitous act. Thus, if a promise is made to pay the plaintiff a sum of money, in consideration of the plaintiff having formerly delivered some goods to the defendant, it is nudum pactum, unless the bygone consideration, the delivery of the goods, was the result of a request by the defendant to the plaintiff. (Sm. Con. 155–6; Broom Com. 308–310, 324; 3 Ste. Com. 59; Chit. Con. 20, 48, 49, 51, 52; Ad. Con. 6, 7, 10, 12, 13; 1 Sm. L. C. 139.) **181.**

Where the request or the promise is implied.

In the case of executory, contemporaneous and continuing considerations, a request is implied. (Broom Com. 308, 313, 315, 316, 325; 1 Sm. L. C. 138.) **182.**

The cases of executed consideration in which a previous request is implied, are: 1. Cases in which the plaintiff or person charging has been compelled to do that which the defendant or person charged ought to have done, and was compellable to do. 2. Cases in which the defendant or person charged has taken the benefit of the consideration, or otherwise adopted the contract. 3. Cases in which the plaintiff or person charging has voluntarily done that which the defendant or person charged was compellable to do, and either the latter has

afterwards expressly promised to repay or indemnify him, or the act done is one of such a nature that it is essential to the public welfare: as where a person voluntarily, but under circumstances which rendered it necessary, incurs reasonable expenses in burying a corpse. 4. Cases in which a person has expended money in procuring necessaries for an infant, and he, on coming of age, expressly promises his benefactor a sum of money in consideration of the same. 5. Cases of money lent, as distinguished from cases of money disbursed for another without request. 6. And where one person for and at the request of another subjects himself to a legal liability to pay money, the law implies a request to the former by the latter actually to pay the money, when necessary. **183.**

In the first two cases and the fifth, the law implies the promise as well as the request. And if one requests another to pay money for him to a stranger, in discharge of a debt due from him, or as a gift or loan from him, to such stranger, there is an implied undertaking to repay it, on the part of him who makes the request; so that, if the request is acceded to, the amount is a debt due to the person paying from the

person at whose request it is paid. (Sm. Con. 158, 165; Broom Com. 309–311, 313, 315, 316, 325; Ad. Con. 7, 11, 20, 23, 24; Rosc. 398–9; Chit. Con. 50, 533–4, 539, 540; 1 Sm. L. C. 130; *England* v. *Marsden*, L. R. 1 C. P. 529; Wms. Ex. 6th ed. 1652–3.) **184.**

Where the consideration will not support an express promise.

Where the law implies a certain promise from a consideration executed, such implied promise is deemed to exhaust the consideration; so that the consideration will not support any express promise in addition to the implied promise. Thus, on an account stated the law implies a promise to pay on request: and therefore the same consideration will not also support an express promise to pay at a future day. (Sm. Con. 166; Broom Com. 326; Chit. Con. 50, 51.) **185.**

Illegal contracts.

With an exception (noticed infra, par. 222) in the case of bills, notes, and mortgages for gaming debts, every contract, whether it be a contract by deed or a simple contract, is void, if it immediately grows out of an illegal act, or stipulates for the performance of an illegal act, or if it is founded upon an illegal consideration. So that even a deed which is good on the face of it may be avoided by adducing evidence of such illegality. (Sm. Con. 167–8; Broom Com. 350–5; Ad. Con. 388–9.) **186.**

In the case of a promise to do several acts, some legal and others illegal, the contract is void as to the illegal acts only, if they are separable from the legal. But illegality in any part of the consideration or in one of the considerations renders the whole contract void. (Sm. Con. 168; Broom Com. 352–3; 1 Sm. L. C. 333; Chit. Con. 593, 621.) **187.**

Two kinds of illegality.

Illegality by statute (*a*).

Illegality is of two sorts—illegality of a statutory kind, and illegality by the unwritten law, whether Common Law or Equity. **188.**

A Court of justice will not carry out an illegal contract (such, for instance, as a lottery) in any way; and, therefore, such a contract cannot be enforced by one party to it against the other, either directly or indirectly, by giving damages or compensation for the breach of it. (*Sykes* v. *Beadon*, L. R. 11 Ch. D. 170, 190, 193, 197.) **188a.**

Contracts in violation of the Lord's Day Act.

By the stat. 29 Car. II. c. 7, s. 1, no tradesman, artificer, workman, or labourer, or other person whatsoever, shall do or exercise any worldly labour, business or work of his ordinary calling, upon the Lord's Day (works of necessity or charity

(*a*) As regards gaming contracts, see infra, par. 219.

only excepted), under a penalty of five shillings: and a contract made in breach of this enactment is void. (Chit. Con. 384.) But the words "or other person whatsoever" are to be construed as ejusdem generis with the preceding words, and therefore do not include farmers. It is a rule in the construction of statutes, as well as of other writings, that general terms following particular ones apply only to such persons or things as are ejusdem generis with the particular ones. (*The Queen* v. *Cleworth*, 4 Best & Sm. 927.) **189.**

Contracts with medical practitioners.

No person can recover any charges for medical or surgical aid, unless he proves at the trial that he was registered under the Medical Act at the time of the services rendered. (Chit. Con. 497; Ad. Con. 419; 21 & 22 Vict. c. 90, s. 32; amended 22 Vict. c. 21; 23 & 24 Vict. cc. 7, 66; 23 Vict. c. 7, s. 3; *De La Rosa* v. *Prieto*, 16 C. B. (N. S.) 578; *Leman* v. *Houseley*, L. R. 10 Q. B. 66.) **190.**

Contracts with chemists and druggists.

Chemists and druggists may prepare or dispense medicines, but cannot give advice or attend patients. (Ad. Con. 420; Chit. Con. 501.) **191.**

Contracts with an unlicensed stockbroker

An unlicensed stockbroker in the city of London or appraiser cannot sue for com-

mission or charges. And an uncertificated solicitor cannot sue for fees or disbursements in respect of any proceedings in Court. (6 & 7 Vict. c. 73, s. 26; Ad. Con. 420; Chit. Con. 497, 503.) **192.**

or appraiser, or an uncertificated solicitor.

A contract which is illegal by the unwritten law is usually deemed so on one of two grounds: 1st, because it is tainted with fraud or otherwise violates morality; 2ndly, because it is opposed to the policy of the law or public policy. (Sm. Con. 169, 196–8; Broom Com. 350–369; 2 Ste. Com. 60; Ad. Con. 888.) **193.**

Illegality by the unwritten law.

Fraud generally consists in the misrepresentation or in the concealment of a material fact which is peculiarly within the knowledge of the party guilty of the fraud, or which is kept by artifice from the knowledge of the opposite party. And when a contract is founded in that sort of fraud of which the Courts take cognizance, it may be avoided, even at Law, by the party defrauded, if he disaffirms it as speedily as may be. But there are some species of artifice which, though moral frauds, are not frauds for which redress is given at Law or in Equity. (Broom Com. 333–6; Chit. Con. 609, 611–615; Ad. Con. 240, 906; *Venezuela Ry. Co.* v. *Kisch*, L. R. 2 H. L. 99. On the

Fraud.

subject of concealment or non-disclosure, see *Smith* v. *Hughes*, L. R. 6 Q. B. 597.) **194.**

Where there has been any fraudulent misrepresentation or wilful concealment by which a person has been induced to enter into a contract, he may be entitled to relief, notwithstanding he might have known the truth by proper inquiry. (*Venezuela Ry. Co.* v. *Kisch*, L. R. 2 H. L. 99, 120.) **195.**

Where a person injured on a railway has executed a release to the company, in consideration of money paid to him, under the false representation, by an officer of the company, that his injuries were only of a trivial and temporary nature, he is not precluded by the release from suing the company, if his injuries turn out to be of a more serious nature than he anticipated. (*Hirschfield* v. *London, Brighton & S. C. Ry. Co.*, L. R. 2 Q. B. D. 1.) **196.**

Contracts between an individual and a company, so far as misrepresentation or concealment is concerned, are to be treated like contracts between individuals. (*Venezuela Ry. Co.* v. *Kisch*, L. R. 2 H. L. 99, 125.) **197.**

If directors issue debentures without authority from the company, and without power to do so, they are personally liable, as

for a breach of warranty, to anyone who has paid money for such debentures on the faith of their being binding. (*Weeks* v. *Propert*, L. R. 8 C. P. 427.) **198.**

If a falsehood is told, whereby a third person is prejudiced, although there may be no profit to the person who tells it, and no injury was intended to the party to whom it is told, but a benefit to a third person, it is a fraud which will support an action of deceit. (Broom Com. 338.) **199.**

And if a person who has no knowledge on the subject represents a certain state of facts to exist, with a view to secure some benefit to himself, or to deceive a third person, he is guilty of a fraud for which redress may be had, even at Law. (Broom Com. 339.) **200.**

But fraud is not a ground of an action, unless it prejudiced the plaintiff; nor can it be set up as a defence, unless it induced the defendant to enter into the contract. (Broom Com. 340; Ad. Con. 906; Sm. Con. 199, 200.) **201.**

A contract induced by fraud is not void, but only voidable at the option of the party defrauded; and though the party who was guilty of the fraud cannot enforce it, yet other persons, in consequence of it, may

acquire interests and rights which they may enforce against the party defrauded. (*Oakes* v. *Turquand*, L. R. 2 H. L. 325, 346.) **202.**

In order to entitle a party to rescind a contract, it is sufficient to show that there was a fraudulent representation as to any part of that which induced him to enter into the contract. But when there has been only an innocent misrepresentation, it is not a ground for a rescission, unless it was such that there is a complete difference in substance between the thing bargained for and that obtained, so as to constitute a failure of consideration. Thus, where a horse is bought under a belief that it is sound, if the purchaser was induced to buy by a fraudulent representation as to the soundness of the horse, the contract may be rescinded. If it was induced by an honest misrepresentation as to its soundness, though it may be clear that both vendor and purchaser thought that they were dealing about a sound horse and were in error, yet the purchaser must pay the whole price, unless there was a warranty; and even if there was a warranty, but no actual fraud on the part of the seller, the purchaser cannot return the horse, and claim back the whole price, unless there were a condition to that effect in the contract.

(*Kennedy* v. *Panama, &c., Mail Co.*, L. R. 2 Q. B. 580; Ad. Con. 6th ed. 222–3; Rosc. 12th ed. 424–471. (See infra, par. 551–2.)

203.

Contracts of immoral tendency.

The parties to contracts of immoral tendency cannot sue upon them (*a*). Thus, a print seller cannot recover the price of obscene or libellous caricatures. A person cannot recover the rent of lodgings knowingly let or the price of goods sold for purposes of prostitution; as where an article of dress or a carriage is sold to a person known by the seller to be a prostitute, who intends to use it for display to attract men. Future illicit cohabitation is an illegal consideration, and a contract founded on it is void. Past cohabitation, though not an illegal consideration, is not a consideration on which a simple contract can be founded. (Broom Com. 367; Ad. Con. 11, 12, 889, 890; Rosc. 449; Chit. Con. 40, 380, 596–7; *Pearce* v. *Brooks*, L. R. 1 Ex. 213.) **204.**

Money promised by a third person to an agent or *employé* to bias him contrary to his principal's interest is a corrupt consideration, and vitiates a contract, so that the money cannot be recovered from such third person, even though the promise has not biassed the

(*a*) As to gaming contracts, see infra, par. 219.

conduct of the agent or *employé*, and, therefore, the principal has not been damaged. (*Harrington* v. *The Victoria Graving Dock Co.*, L. R. 3 Q. B. D. 549.) **204a.**

Contracts by persons who are under disability.

The law presumes that everyone has a capacity to contract, except insane persons, infants, and married women (*a*), who are under disability, either absolute or limited. Weakness of mind short of insanity, immaturity of reason in the case of an adult, or the want of experience and skill, is no ground for relief at Law or in Equity, if no fraud has been practised. (Chit. Con 130.) **205.**

Contracts by persons who are not free agents.

Where a person is led to contract through fear of loss of life or limb, or of personal violence, or of being deprived of his liberty, or of being ill-treated when in lawful confinement, the contract is voidable by him, even at Law. (Broom Com. 590, 591; Chit. Con. 189–192.) **206.**

Contracts by infants.

Before the stat. 37 & 38 Vict. c. 62 (see Appendix), contracts to an infant's prejudice were void. Contracts which were necessary and for his benefit were valid. Contracts which did not fall distinctly under these descriptions were voidable: these he might

(*a*) As to contracts by and with married women, see infra, par. 360-9.

by confirmation, or, in some cases, by mere acquiescence, after he became of age, render himself liable to perform. (2 Ste. Com. 312, 313; Story's Eq. § 341; Burton, § 199; Ad. Con. 935, 941–3.) So that if an infant entered into a contract, except for necessaries, no action could be maintained against him during his infancy; but the contract, if it might be for his benefit, was not absolutely void, but voidable. If he did not confirm it after he attained his majority, it could not be enforced against him. But if he confirmed it voluntarily, and with a knowledge of his right to protection from it (and in writing signed by him, see supra, par. 170), he became liable to an action upon it. (Sm. Con. 273; Ad. Con. 942–3; Broom Com. 566; Rosc. 449, 451; Chit. Con. 136, 145–6; *Bartlett* v. *Wells*, 1 Best & Sm. 836; *De Roo* v. *Foster*, 12 C. B. (N. S.) 272; *Helps* v. *Clayton*, 17 C. B. (N. S.) 553; *Rowe* v. *Hopwood*, L. R. 4 Q. B. 1.) **207.**

An infant could not bind himself by borrowing money even for necessaries, nor by any contract connected with trade or mercantile contract, as by a bill or note, nor by a cognovit, nor by stating an account, nor by a bond in a penalty, even though each of these was for necessaries. (Sm. Merc. Law,

18; Sm. Con. 270–2; Broom Com. 566, 567; Ad. Con. 937; Rosc. 450, 451; Chit. Con. 141–2; Byles, 54–6.) **208.**

An adult who contracted with an infant was bound, although the infant was not. (Sm. Con. 279; Ad. Con. 15, 937; Chit. Con 15, 130, 148.) **209.**

An infant, living under his parents' roof, is not ordinarily liable for the price even of necessaries ordered by him; as the law assumes that these are provided for him. But if he is an orphan, or if he is residing at a distance from his parents, and is not provided with necessaries by them, he may bind himself for necessaries, such as food, apparel, medicine, and instruction, for himself, his wife, and legitimate children, according to his station, so as to render him liable to pay a fair price or remuneration for them. What are necessaries is a question for the jury, and the affirmation lies on the plaintiff. (Ad. Con. 938–940; 2 Ste. Com. 312, 313; Story's Eq. § 240; Sm. Con. 260–269; Broom Com. 566, 569–571; Burton, § 199; Rosc. 449, 450; Chit. Con. 9th ed. 140, et seq.; *Ryder* v. *Wombwell*, L. R. 3 Ex. 90.) **210.**

Contracts and other acts of persons of unsound mind.

Where a person who is at the time of unsound mind, but apparently sane, enters

into a fair and bonâ fide contract with a person who is not aware of his insanity, for the purchase of property, and it has been paid for, or a deposit has been paid, such contract cannot afterwards be set aside, either by the lunatic or those who represent him. (Phil. Lun. 17; Broom Com. 588; Rosc. 452; Chit. Con. 131–4; Ad. Con. 944–5; Sm. Con. 294–7.) **211.**

In the case of contracts or other acts, however solemn, of persons who were idiots, lunatics, or otherwise of unsound mind, wherever, from the nature of the transaction, there was not evidence of entire good faith, or it was not seen to be just in itself, or for the benefit of those persons, Courts of Equity would set it aside, or make it subservient to their just rights and interests. But where there was entire good faith, and the contract or other act was for the benefit of such persons, as to provide them with necessaries, there both Courts of Law and Courts of Equity would uphold it. (Sm. Eq. Manual, 13th ed. par. 128.) And a lunatic is liable upon a reasonable contract, wholly or in part executed, for articles suitable to his degree, though they be not necessaries, supplied by a person who was not aware of his lunacy. (Sm. Con. 294–7; Ad. Con.

944–5; Broom Com. 586; Phil. Lun. 17, 18; Chit. Con. 131–3.) **212.**

If a husband gives authority to his wife to act as his agent in pledging his credit, with the creditor's knowledge, and then the husband becomes lunatic, and the creditor supplies goods to the wife on the faith of such authority, though the authority is revoked by the lunacy, as between the husband and wife, yet if the creditor supplied the goods without notice of the lunacy or the revocation of the authority, the husband is liable. (*Drew* v. *Nunn*, L. R. 4 Q. B. D. (Ap.) 661.) **212a.**

Contracts by intoxicated persons.

A person contracting whilst manifestly so intoxicated as not to know the consequences of his entering into the contract, is not liable, even though the contract is entered into by deed, unless it is for necessaries which were requisite for his preservation, or which he consumes or keeps after he becomes sober. (Broom Com. 589, 590; Ad. Con. 944; Chit. Con. 135.) But the contract of a drunken man is only voidable, and not void. (*Matthews* v. *Baxter*, L. R. 8 Ex. 132.) **213.**

Contracts by aliens or persons domiciled in an enemy's

Alien friends may enter into contracts with British subjects, and may sue on such contracts in the Courts of this country.

(Sm Con. 300–4; Chit. Con. 171; Ad. Con. 933–4; 33 Vict. c. 14, s. 1.) (*a*) **214.**

country, or in his service.

Unless, and except so far as, the stat. 33 Vict. c. 14 may be deemed to remove the disability of alien enemies, all contracts by alien enemies, *i.e.*, aliens whose Government is at war with this country, unless they are resident here by licence of the Crown, and all contracts by British subjects and subjects of neutral powers, voluntarily domiciled in an enemy's country, or engaged in his service, unless they have a licence from the Crown to trade, are void, except that they may be sued upon their contracts, though they cannot sue. (Sm. Con. 303; Broom Com. 592; Ad. Con. 901, 934; Chit. Con. 171–2.) **215.**

Contracts by outlaws and criminals.

Outlaws and persons under sentence for felony are, for the time being, disabled from enforcing contracts, but are liable upon them. (Sm. Con. 304; Broom Com. 592; Ad. Con. 935; Chit. Con. 173.) **216.**

Illegal contracts generally.

The following contracts are also void:—

Contracts, as a general rule, which have a tendency to interfere with the due administration of public justice;

(*a*) Before this Act, they could not acquire real estate, or leaseholds, other than for 21 years, for the purposes of occupation or business. (See Smith's Law of Property, 5th ed. par. 3349–3361.)

Contracts in restraint of industry or trade, generally, or to an extent which is unnecessary for the protection of the opposite party;

Contracts which create or tend to create or secure a monopoly (except by way of patent);

Contracts prejudicial to the revenue;

Marriage brokerage or brokerage contracts for procuring a marriage;

Contracts operating in general restraint of marriage;

Contracts for the prevention of cohabitation between man and wife;

Contracts respecting separation, unless it is actually existing at the time;

Contracts for the sale or transfer of certain public appointments;

Simoniacal contracts;

Contracts for recommending to situations for a secret reward;

Contracts which are inconsistent with public duties;

Contracts tending to secure persons against the consequences of illegal acts, which concern the public, and not acts merely or primarily affecting an individual, and for which he could recover damages;

Contracts whereby a person who has no

interest in a matter in litigation, agrees to aid in it (which is called maintenance);

Contracts whereby a person who has no interest in a matter in litigation (or only a collateral interest) (*Hutley* v. *Hutley*, L. R. 8 Q. B. 112), agrees, in consideration of a share of the fruits thereof, to render aid in regard to such litigation (which is called champerty);

Contracts contravening the rules of the Common Law or the object of legislative enactments;

Contracts involving objects subversive of Christianity, such as contracts for the dissemination of infidel opinions;

And all other contracts which are injurious to the public welfare. (See Sm. Con. 187, et seq.; Broom Com. 355–366; Ad. Con. 740–1, 772–3, 888–904, 908; Tapp, 19, 20, 31; Chit. Con. 380, 382, 456, 592, 597–608, 621–5, 632–5; *Grell* v. *Levy*, 16 C. B. (N. S.) 73; *Chubb* v. *Hutson*, 18 C. B. (N. S.) 414; *Williams* v. *Bayley*, L. R. 1 H. L. 200; *Cowan* v. *Milbourn*, L. R. 2 Ex. 230; *Collins* v. *Locke*, L. R. 4 Ap. Cas. 674.)

217.

An incumbent, as the freeholder of the churchyard, may enter into a contract to allow the burial of a non-parishioner in

consideration of the payment of an extra fee. (*Nevill* v. *Bridger*, L. R. 9 Ex. 214.) **218.**

Gaming contracts.

As regards gaming contracts, it is enacted by the stat. 8 & 9 Vict. c. 109, s. 18, as follows :—"That all contracts or agreements, whether by parole or in writing, by way of gaming or wagering, shall be null and void; and that no suit shall be brought or maintained in any Court of Law or Equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made: Provided always, that this enactment shall not be deemed to apply to any subscription or contribution, or agreement to subscribe or contribute, for or toward any plate, prize, or sum of money to be awarded to the winner or winners of any lawful game, sport, pastime, or exercise." **219.**

A wager is a contract in which A. engages to pay B. a sum of money in one case; and B. engages to pay A. a sum of money in the opposite case. By the above statute all wagers are void, whether they relate to things lawful or unlawful in themselves. (See *Hampden* v. *Walsh*, L. R. 1 Q. B. D. 189.) **220.**

This enactment prevents the winner of a

wager, even upon a lawful game, race, sport, pastime, or exercise, from recovering the money won, from the loser. But, upon the same principle of the repudiation of such contracts by the policy of the law, any person may get back his own deposit on an illegal consideration, or on a wager of any kind, from a stakeholder, before the event, or even after the event, if it has not been paid over by him, or if it has been paid over to the winner, after notice not to pay it over. (Ad. Con. 7th ed. 210; Rosc. Evid. 12th ed. 530; Chit. Con. 9th ed. 579, 580; *Hampden* v. *Walsh*, L. R. 1 Q. B. D. 189; *Batson* v. *Newman*, L. R. 1 C. P. D. (Ap.) 573; Ad. Con. 7th ed. 210; *Trimble* v. *Hill*, L. R. 5 Ap. Cas. 342.) **221.**

Notes, bills, and mortgages for gaming debts are to be deemed for an illegal consideration, and not absolutely void, where such bills or notes are not overdue, and such securities are in the hands of a bonâ fide holder or transferee without notice, and for valuable consideration. (8 & 9 Vict. c. 109, s. 15; Chit. Con. 9th ed. 649; Ad. Con. 7th ed. 210; Rosc. Evid. 12th ed. 358.) **222.**

It has been held, to the disgrace of the law and the ruin of many, that money knowingly lent to pay a gaming debt, if the game

were a lawful one, or to play a lawful game, may be recovered. (Chit. Con. 9th ed. 650; Ad. Con. 6th ed. 894–5; Rosc. Evid. 12th ed. 575–6.) Thus, what the Legislature has prohibited to be done directly, the Courts have allowed to be done indirectly! **223.**

There is nothing illegal by the Common Law or by the stat. 8 & 9 Vict. c. 109, s. 18, in a person employing a broker to speculate for him on the Stock Exchange, though he, to the knowledge of the broker, does not intend to accept the stock bought for him, or to deliver the stock sold for him, but expects the broker to arrange matters that nothing but differences should be payable by him. (*Thacker* v. *Hardy*, L. R. 4 Q. B. D. (Ap.) 685.) **223a.**

Where one person advances money to another, to be employed by him (with some of his own money) in betting on horses, and a proportion of the winnings is to be paid to the person so advancing money, he is entitled to sue the other person on a note given in respect of the money. (*Beeston* v. *Beeston*, L. R. 1 Ex. D. 13.) But where a person, called "a tipster," gives information as to a horse likely to win, and it is agreed that if the person to whom the information is given backs the horse, and the horse wins, the in-

formant shall have a certain amount out of the winnings, but that if the horse loses the informant shall pay a certain sum to the other party, this is void as a wagering contract. (*Higginson* v. *Simpson*, L. R. 2 C. P. D. 76.) **224.**

Contract between the subscribers to a charity.

A contract between a plaintiff and defendant, two subscribers to a charity, that if the plaintiff will give a certain number of votes for the defendant's candidate, the defendant will give a like number of votes at a subsequent election for the candidate of the plaintiff, is a contract founded on a valid legal consideration. (*Bolton* v. *Madden*, L. R. 9 Q. B. 55.) **225.**

Distinction between void and voidable transactions, as regards confirmation.

Wherever any contract or conveyance is void, either by a positive law or upon principles of public policy, it is deemed incapable of confirmation; it being a maxim, Quod ab initio non valet, in tractu temporis non convalescit. But where it is merely voidable, or turns upon circumstances of undue advantage, surprise or imposition, there it is valid until it is rescinded; and if it is deliberately and upon full examination confirmed by the parties, it will be valid. (Sm. Eq. Manual, 13th ed. par. 146, 147.) **226.**

Recovery of money paid under a contract.

Money paid under an executory illegal contract may be recovered before completion,

in an action for money had and received, even though the parties are in pari delicto. Money paid under an executed illegal contract may be recovered back, when the two parties are not in pari delicto, and the party who paid the money is the more innocent of the two. But when both parties are in pari delicto, money paid cannot be recovered back; for the maxim is that "in pari delicto, potior est conditio possidentis." (*Taylor* v. *Chester*, L. R. 4 Q. B. 309.) When a contract is void, though not illegal, money paid under it may in general be recovered back on the ground of failure of consideration. But where the purchaser has got the sort of thing he bargained for, he cannot recover back the price, though it may turn out of no value. (Ad. Con. 910–912; Chit. Con. 575–7; Rosc. 413, 414; Selw. 93–100; 2 Sm. L. C. 457–8.) **227.**

Recovery of goods delivered for a fraudulent purpose.

If goods are delivered for an unlawful purpose, which is not carried out (as where goods are made over to defraud creditors, but no bill of sale is executed), the owner may repudiate the purpose, and recover the goods, against the person to whom they were made over, and anyone claiming under him, with notice. (*Taylor* v. *Bowers*, L. R. 1 Q. B. D. (Ap.) 291.) **228.**

Motive or animus in cases of breach of contract.

In an action on contract, the motive or animus of the defendant is immaterial; because the breach of the agreement renders the party guilty of it liable, ipso facto, for the direct pecuniary loss resulting therefrom; and the damages are limited to that. (Broom Com. 342–3.) **229.**

Assignment of a contract.

As a general rule, prior to the Supreme Court of Judicature Act, 1873 (which came into operation on the 2nd day of November, 1875), a contract was not assignable at Law. The instrument (if any) of contract, indeed, passed to the assignee, so that he might maintain an action for the recovery of the document. But the benefit of a contract could not be transferred at Law, so as to put the transferee in the place of the transferor, and entitle the transferee to maintain an action upon the contract in his own name; but the transferee might sue in the name of the transferor. Thus, if a bond were assigned, the assignee could not sue upon it (unless it was one of those bonds which the Legislature has excepted from the general rule); but he could sue in the name of the obligee. And if a personal chattel was assigned, the assignee could not sue on a covenant entered into by another person with the assignor respecting it. (Sm. Con.

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247–8; Ad. Con. 796–7.) And the parties to a contract could not by express words confer on the assignee of the contract a right to sue in his own name. Nor can they make it a negotiable instrument, so as to deprive the assignee of either the contract or the property represented by it, of his right to take back his property from anyone to whom a thief may have transferred it, even though that transferee took it bonâ fide and for value. (*Crouch* v. *Credit Foncier of England*, L. R. 8 Q. B. 374, 380, 387.) Policies of Life or Marine Assurance, however, were made assignable at Law. (See infra, Part III. Tit. II. Cap. IX.) And by the Supreme Court of Judicature Act, 1873, s. 25, clause (6), it is enacted that "Any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be, and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed), to pass and transfer the

Enactment as to assignment of debts and choses in action, by the Judicature Act.

Vide R.S.O. Cap. 116 - Sec. 7.

legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor: Provided always, that if the debtor, trustee, or other person liable in respect of such debt or chose in action shall have had notice that such assignment is disputed by the assignor or anyone claiming under him, or of any other opposing or conflicting claims to such debt or chose in action, he shall be entitled, if he think fit, to call upon the several persons making claim thereto to interplead concerning the same, or he may, if he think fit, pay the same into the High Court of Justice under and in conformity with the provisions of the Acts for the relief of trustees." **230.**

General rules as to the way in which a contract ought to be evidenced and construed.

When an agreement has been put into writing, it must be proved by the writing alone, or by that and any other connected with it, so far as it appears to be a complete contract, without reference to any prior or contemporaneous verbal expressions which would alter, add to, or take away from its import, or show its meaning to be different from what its words import. But so far as on the face of it the contract is incomplete in some particular of price, time of delivery,

&c., its deficiency may be supplied by parol evidence, unless that would be contrary to a statute. And a distinct collateral verbal agreement between the parties prior to or contemporaneously with the written agreement, and connected and not inconsistent with it, may be enforced, if otherwise valid. (Sm. Con. 35–6, 39; Broom Com. 371–2, 491; Ad. Con. 1019–1022; Best, 302; Powell, 388, 400–1; Rosc. 14, 15; Chit. Con. 95, 103–4; *Harris* v. *Rickett*, 4 Hurl. & Norm. 1; *Lindley* v. *Lacey*, 17 C. B. (N. S.) 578; *Malpas* v. *London & S. W. Ry. Co.*, L. R. 1 C. P. 336; *Morgan*, app., *Griffith*, resp., L. R. 6 Ex. 70; *Evans* v. *Roe*, L. R. 7 C. P. 138; *Angell* v. *Duke*, L. R. 10 Q. B. 174.) **231.**

An executory agreement, not under seal, may be shown to have been subsequently waived, annulled, added to or varied, even verbally, where a writing was not necessary in the first instance. But where by statute a written contract is necessary, the whole of the contract must be in writing; so that written contracts made pursuant to a statute cannot afterwards be varied or added to by word of mouth. And a deed cannot be revoked or discharged except by deed. (Sm. Con. 40–1; Broom Com. 371–2, 374; Powell,

388–392; Ad. Con. 1021, 1025–6; Rosc. 22, 23; Chit Con. 104; *Noble* v. *Ward*, L. R. 1 Ex. 117; 2 Ex. (Ex. Ch.) 135; see supra, par. 258.) **232.**

In the case of patent ambiguity, *i.e.*, an ambiguity apparent on the words themselves, no parol evidence is admissible to remove it. But in the case of a latent ambiguity, *i.e.*, an ambiguity which lies concealed, but is made to appear by parol evidence, such evidence is admissible to explain it, as well as to raise it: as when it appears that there are two persons or things of the same name. (Sm. Law of Prop. 5th ed. par. 2523; Best, 302–5; Powell, 405; Rosc. 23, 24; Chit. Con. 100–1; Ad. Con. 1025–6.) **233.**

In many cases, even at Law, extrinsic evidence may be resorted to; either in support of deeds, by showing a sufficient consideration, if not inconsistent with the deed; or by way of defence against written instruments, when obtained by duress, menace, fraud, illegality, or mistake. (Best, 306; Rosc. 17, 18; Chit. Con. 107; Ad. Con. 235; Sm. Con. 168; Broom Com. 350, 351, 354, &c.) **234.**

Where parties have contracted with reference to some established usage known to them, the contract is construed with reference to such usage, so long as it is not inconsis-

tent with the express language of the written contract. (Sm. Con. 45–8; Broom Com. 498–9, 502, 504; Ad. Con. 1027; Powell, 408–410; Rosc. 18–21; Chit. Con. 80, 89, 90, 96, 100, 105; *Bowes* v. *Shand*, L. R. 2 Ap. Cas. 455.) And the meaning of the words used may be explained by evidence, where they are terms of business, art, or science, or where, though they may be words in general use, they have a peculiar signification among a particular class of persons, as well as a popular meaning. (Sm. Con. 54, 58; Broom Com. 496–500, 504; Ad. Con. 1027–8; Chit. Con. 78, 80, 100; *Myers* v. *Sarl*, 3 Ell. & Ell. 306; *Bowes* v. *Shand*, L. R. 2 Ap. Cas. 455.) Extrinsic evidence may also be resorted to for the purpose of annexing to a written contract that which constitutes an ordinary incident (according to common sense, or by the common law, or by the usage of trade, or by the custom of the country, of which the parties may be presumed to have been cognizant), provided it is not inconsistent with the terms of the written instrument. (Broom Com. 500–1; Ad. Con. 1027; Powell, 410; Rosc. 16–18; Chit. Con. 97, 105; *Field* v. *Lelean*, 6 Hurl. & Norm. 617.) **235.**

An incident may be annexed to a contract

by the ancient law merchant, which forms part of the general law, and of which the Courts take notice. And if the ancient law merchant annexes the incident, no modern usage can take it away. Moreover, incidents which the parties are competent by express stipulation to introduce into their contracts, may be annexed by custom, however recent, provided it be general, on the ground that they are tacitly incorporated in the contract. But if the wording of an instrument is such as to exclude this tacit incorporation, no usage can annex the incident. And where the incident is of such a nature that the parties themselves are not competent to introduce it by express stipulation, no such incident can be annexed by the tacit stipulation arising from usage. (Mr. Justice Blackburn in *Crouch* v. *Credit Foncier of England*, L. R. 8 Q. B. 386.) **236.**

A usage may be of such a peculiar nature, that parties may not be liable under it, unless it was known to them at the time of the contract. (*Robinson* v. *Mollett*, L. R. 7 H. L. 802.) **237.**

The existence of a usage, peculiar meaning, or incident, is matter of fact for the jury (if any), and must be established by clear and positive proof, either written or

oral, and not by mere opinions of witnesses; and it is also for the jury to say whether the parties contracted with reference to such usage, meaning, or incident. But when such usage, meaning, or incident, and the contracting with reference to it, are so ascertained by the jury, the construction of the instrument, in these as in other cases, belongs to the judge. (Sm. Con. 58, 59, 453–4; Broom Com. 499, 505–9; Chit. Con. 70, 80, 90; *Ashforth* v. *Redford*, L. R. 9 C. P. 20; *Bowes* v. *Shand*, L. R. 2 Ap. Cas. 455.) **238.**

All written contracts, whether under seal or not, ought to be construed favourably, so as to support and effectuate the apparent intention of the parties, as far as possible, consistently with the rules of law. The intention, however, must not be imputed by mere conjecture, but (subject to the preceding remarks) it must be collected from the instrument itself; and in general no construction is to be made contrary to the words; and the words are generally to be construed in their ordinary and proper sense, where they are capable of being carried into effect in that sense, unless from the context or the surrounding circumstances it is plain that the parties intended to use them in some other sense. And if the words are

susceptible of two senses, the sense which is agreeable to law is to be preferred to that which is contrary to law, and the sense which is the most reasonable to that which is less reasonable. And the construction should be made not merely upon particular words or parts, but upon the entire instrument, so as to give effect, if possible, to every part and every word, as well as to the evident object and intent, without violence to any word or part; though, if necessary, the words may be transposed, or their grammatical construction disregarded, or a part totally repugnant to the general intent may be controlled or rejected. (Sm. Law of Prop. 5th ed. par. 2512–2514; Sm. Con. 451–7; Ad. Con. 1024–7; Chit. Con. 72, 75–84, 88, 99, 100, 594.) **239.**

Effect of recitals.

Recourse may be had to the recitals to explain doubtful words in the operative part of a deed or agreement, but not to control clear and unambiguous words in the operative part. (Chit. Con. 82, 83; Sm. Law of Prop. 5th ed. par. 1742.) **240.**

Erroneous addition.

An erroneous addition will not vitiate a prior adequate designation or description. Falsa demonstratio non nocet. (Chit. Con. 84; Sm. Law of Prop. 5th ed. par. 1754.) **241.**

Repugnancy.

Of two totally repugnant clauses, the former is to be received, and the latter

PART II. TIT. I.

rejected. (Chit. Con. 88; Sm. Law of Prop. 5th ed. par. 2519.) **242.**

Contracts made in one country to be performed or enforced in another.

Contracts made in one country concerning real property in another, are to be interpreted according to the law of the country in which the property is situate. But a contract concerning personalty is generally to be governed by the law of the country where the contract is made, as regards its nature, obligation, and effect; and by the law of the country where the contract is to be performed, as regards the performance of it; and by the law of the country where the contract is to be enforced, as regards the proceedings for enforcing it. (Ad. Con. 1034; Chit. Con. 88–90; *Scott* v. *Pilkington*, 2 Best & Sm. 11; *Peninsular & Oriental Co.* v. *Shand*, 3 Moo. P. C. (N. S.) 272, 290.) **243.**

Joint or several contracts.

If two or more persons bind themselves to do an act, there, in the absence of words or reasons to the contrary, the general rule is, that they are bound jointly, and not severally. But even though the agreement be primâ facie joint, it may be construed to be several, if the interest of either party appearing on the face of the instrument requires it. And, on the other hand, even though the agreement be primâ facie several,

yet if ambiguous, it will be construed to be joint, if the interest be joint. (Chit. Con. 94; Ad. Con. 965–6.) **244.**

Where several persons, not being partners, enter into a common liability, each has an implied authority from the others to discharge it; so that if one pays more than his share, he may recover the excess beyond his share from the others, as money paid for them at their request. (Ad. Con. 24; Chit. Con. 541–2.) **245.**

Contract in the alternative.

If a contract is in the alternative, the contractor has the right of election; but if the one thing cannot be performed, the contractor must perform the other. (Chit. Con. 640; Ad. Con. 1038.) **246.**

Time for performance.

Where no time is fixed, a contract must be performed within a reasonable time. (Chit. Con. 640; Ad. Con. 194.) **247.**

Where a contract is to be performed within a certain time after the date, it seems that the day of the date is to be excluded. (Chit. Con. 642.) **248.**

A certain time from the "making" of an agreement or "from henceforth," is to be computed from the execution, not from the date. (Chit. Con. 642.) **249.**

Where "from six to eight weeks" is named in a contract, as the time for payment, an

action may be brought for the money before the expiration of eight weeks. (*Ashforth* v. *Redford*, L. R. 9 C. P. 20.) **250.**

Ordinarily and primâ facie, a month in a contract means a lunar month (Sugd. V. & P. 14th ed. 257; Chit. Con. 641; Byles, 188; but see Ad. Con. 91; Wharton), except in mercantile contracts, where it means a calendar month. In statutes passed before the end of the year 1850, it primâ facie means a lunar month; but in statutes passed after the year 1850, it primâ facie means a calendar month. (Chit. Con. 641; Byles, 188; 13 & 14 Vict. c. 21, s. 4.) **251.**

Where a man undertakes to make a thing "as soon as possible," he must be deemed to have undertaken to make it as soon as a person having all such appliances as he might reasonably be expected to possess, could reasonably be expected to do it, and not merely as soon as he could conveniently do it under the actual circumstances. (*Hydraulic Co.* v. *McHaffie*, 4 Q. B. D. (Ap.) 670.) **251a.**

Where time is of the essence of the contract.

Prior to the Supreme Court of Judicature Act, 1873, the time appointed for the doing of a single act was generally of the essence of the contract at Law. But even where time was not originally of the essence of the con-

tract, it might be made so by a notice from the opposite party to do the act within a reasonable time. (Ad. Con. 1041.) By that Act, s. 25, clause (7), it is enacted that "Stipulations in contracts, as to time or otherwise, which would not before the passing of this Act have been deemed to be or to have become of the essence of such contracts in a Court of Equity, shall receive in all Courts the same construction and effect as they would have heretofore received in Equity." **252.**

Demand of performance.

In the absence of express stipulation, or of any particular reason for it, a request or a demand of performance is not necessary. (Chit. Con. 645.) **253.**

Excuses for non-performance.

With regard to the cases where performance is excused: First, where the performance depends on the continued existence of a person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing without the fault of the contractor, shall excuse the performance. (*Taylor* v. *Caldwell*, 3 Best & Sm. 826, 839; *Appleby* v. *Myers*, L. R. 2 C. P. (Ex. Ch.) 651.) Secondly, non-performance is excused, if the thing contracted to be done is antecedently impossible, or becomes impossible by the act

or default of the promisee, or by the act of God, or of the law, or of public authority: as where a pianist engages to play, but is prevented by illness (*Robinson* v. *Davison*, L. R. 6 Ex. 269; *Cunningham* v. *Dunn*, L. R. 3 C. P. D. (Ap.) 443); or where a person agrees to sell the whole or a part of a specific crop to be grown on specified land, and the crop on that land fails, without any fault of the vendor. (*Howell* v. *Coupland*, L. R. 9 Q. B. 462; 1 Q. B. D. (Ap.) 258.) But it is not excused by any other subsequent impossibility of performing the thing contracted to be done. Thirdly, non-performance is excused, (1). If the opposite party refuses or fails to perform his part of the contract, in the case of his performance being a condition precedent. (2). Where the contract is based on the supposed existence of a certain state of things, as a condition precedent, and it is found not to exist. (3). In the case of covenants or stipulations founded on a mutual obligation. But where the defendant has taken the benefit, in a substantial manner, of the contract, he cannot repudiate the contract on account of a failure of a part, though an important part of the consideration. And in the case of independent mutual contracts, each party has his remedy on the promise of

the other, without performing his own promise. (Chit. Con. 646–653; Ad. Con. 460, 916, 1032–4, 1044; *Russell* v. *Da Bandeira*, 13 C. B. (N. S.) 149; *Brown* v. *Mayor, &c., of London*, 13 C. B. (N. S.) 828; *Boast* v. *Firth*, L. R. 4 C. P. 1; *Simpson* v. *Crippin*, L. R. 8 Q. B. 14; *Carter* v. *Scargill*, L. R. 10 Q. B. 564.) Fourthly, non-performance is excused, and indeed justified, if the contract is illegal. (*Cowan* v. *Milbourn*, L. R. 2 Ex. 230; *Plevins* v. *Downing*, L. R. 1 C. P. D. 220; *Poussard* v. *Spiers*, L. R. 1 Q. B. D. 410.) **254.**

Rescinding, discharging, or dispensing with a contract.

A gratuitous promise may be revoked, so long as nothing has been done on the faith of it. But in general a contract based on a good consideration cannot be rescinded except by the consent of both parties, unless it is tainted by fraud. Where it may be rescinded by one party, it can only be rescinded within a reasonable time, and by a party who is in no default, and provided both parties can be placed in their original position. (Chit. Con. 653–4; Ad. Con. 919.) **255.**

We have seen that a contract under seal can only be discharged by a deed or by a judicial or legislative act. But a parol contract, even in writing, may, before breach of

it, be discharged, or the performance of it, or any part of it, may be dispensed with by a subsequent verbal agreement. But after breach, the contract, though it be only verbal, and the liability of the promissor thereon, cannot be discharged, except by a deed or by accord and satisfaction. To this rule, however, bills and notes are an exception; for they may be discharged by parol without consideration. (Ad. Con. 918–920, 974–5; Chit. Con. 688–9; Byles, 182; Rosc. 22.) **256.**

Where a person claiming to be paid for work did the work under a written contract, and the document has been altered in a material part by the person for whom the work was done, there, though the document may not be binding on the opposite party who did the work, yet it may be looked at to see what the terms of the contract were, so as to preclude such opposite party from claiming inconsistently with the document. (*Pattinson* v. *Luckley*, L. R. 10 Ex. 330.) **257.**

It has been held that where the subsequent agreement, if it had been an original agreement, would have been required by the Statute of Frauds to have been in writing, it cannot operate, if it is not in writing, even

as a rescission of the original agreement. (*Noble* v. *Ward*, L. R. 1 Ex. 117; 2 Ex. (Ex. Ch.) 135.) **258.**

Dissolution of contract by death.

Unless there is an express or implied stipulation to the contrary, there is an implied condition, in contracts for personal services, that the death of either shall dissolve the contract. (*Farrow* v. *Wilson*, L. R. 4 C. P. 744.) **259.**

Stamps.

If the subject-matter of an agreement is of less value than 5*l.*, a stamp is not requisite; and a mere acknowledgment of money or property requires no stamp. And the Stamp Acts are to be construed strictly, and not to be extended to cases not clearly falling within their provisions. (Chit. Con. 109, 114, 115; Rosc. 12th ed. 266–7; Vacher's Pocket Digest of Stamp Duties.) **260.**

An instrument requiring a stamp is not receivable in evidence, for the purpose for which it was made, until it is stamped; but it may be received in evidence for a collateral purpose. And it may be stamped at any time before it is produced for trial, on payment of a penalty in most cases. (Chit. Con. 108, 123–4; Griffiths & Holmes on Bankruptcy, 112; *Ponsford* v. *Walton*, L. R. 3 C. P. 167.) **261.**

TITLE II.

OF INJURIES TO PROPRIETARY RIGHTS.

CHAPTER I.

OF INJURIES TO REAL PROPERTY.

THE injuries to real property are principally six: 1. Ouster; 2. Trespass; 3. Nuisance; 4. Waste; 5. Subtraction; 6. Disturbance. **262.**

I. *Of Ouster.*

Ouster, how effected.

1. Ouster is the deprivation of the possession. It is effected by abatement, intrusion, disseisin, or deforcement. (3 Ste. Com. 473–6.) Abatement is a wrongful entry by a stranger, on the death of the owner of the inheritance. Intrusion is a wrongful entry by a stranger, on the determination of a particular estate of freehold, before the remainderman or reversioner enters, or a wrongful entry on the demesnes of the Crown, and taking the profits thereof.

Disseisin is a wrongful putting out of a person seised of the freehold in actual possession. Deforcement is a detainer of the freehold from the person entitled, in other cases. (Sm. Law of Prop. 5th ed. par. 1460–1474.) **263.**

II. *Of Trespass.*

Definition of a trespass.

In a wide sense, a trespass is an injurious act, not amounting to treason or felony. (Ad. Torts, 139; Wharton.) **264.**

But a trespass on land, in the generic sense of the term land, is an unwarrantable entry on it, or an unwarrantable use of it, either personally or by one's servants or cattle. (Selw. 1295; 3 Ste. Com. 487, 489; Rosc. 613.) Thus, the throwing a heap of stones, or pouring water out of a pail, or planting posts or rails, on another's land, and even the mere walking upon it, without damage to the soil or grass, is a trespass. (Ad. Torts, 139, 142–3.) When a footpath is dedicated to the public, it has been held that there is a reservation of the right to plough it up! (*Arnold* v. *Blaker*, L. R. 6 Q. B. (Ex. Ch.) 433); and that if it becomes impassable after being ploughed up, the public have no right to pass over the adjoin-

Instances of trespass.

ing part of the field! (*Arnold* v. *Holbrook*, L. R. 8 Q. B. 96.) **265.**

Action by tenant and reversioner for injury to buildings,

If buildings are tortiously and permanently injured by a third person, the tenant may sue in respect of the injury in an occupation point of view, and the reversioner in respect of the diminution in the saleable value of the property. (Ad. Torts, 158.) **266.**

and for injuries to trees.

Where trees are injured, damages are recoverable by the occupier and by the reversioner—damages for the loss of shade, shelter, and fruit, by the former; damages for the loss of the timber, by the latter. (Ad. Torts, 181; Mayne, 238.) **267.**

Expelling a trespasser.

A mere trespasser may be ejected, and if necessary, by force; unless he is permitted to remain without effort to remove him; in which case he will gain a possession. (Ad. Torts, 141; Ad. Con. 365; see supra, par. 14.) **268.**

Damages for trespass.

In actions for trespass, the jury are not limited to the actual injury inflicted, and may take any circumstances of aggravation into account. Thus, substantial damages may be recovered against a wilful intruder into a dwelling-house, though no actual injury has been done either to person or property. (Rosc. 615; Mayne, 242; Ad. Torts, 179.) **269.**

III. *Of Nuisances.*

A nuisance has been already defined. (See supra, par. 20.) (*a*). **270.**

Injuriously affecting another's property, or his reasonable enjoyment of it.

A person will become liable to an action for a nuisance, by erecting a building which overhangs another's house or land: or by fixing a spout or projection which tends to cause a quantity of water to descend on another's house or land; or by firing off explosive substances, close to his neighbour's land, in order to frighten the game; or by setting up a noisy, noxious, or offensive trade, such as a smith's forge, a brewery, a soap-boilery, a tallow-furnace, a dye-house, or smelting works, or by burning bricks; unless it is in a place where it does not amount to a nuisance to the party complaining, or the person exercising it can establish a prescriptive right, by showing that he has exercised it without molestation or interruption in the same manner for twenty years. So a person will be liable by erecting a privy or hogstye, to the annoyance of his neighbour, or allowing the filth of his cesspool or drain to percolate through his neighbour's land and contaminate the water of his well or

(*a*) As to a nuisance in a river, see *White* v. *Phillips*, 15 C. B. (N. S.) 245.

spring, or to enter the drain for waste water through his neighbour's land. And so, if a man injures the grass or corn or cattle of another, or obstructs the private way, or in any other manner besides that already mentioned, corrupts or diverts, or prejudicially affects the watercourse of another, it is a nuisance, for which the law will give a remedy. (Ad. Torts, 74–5, 78–9; Broom Com. 757–8; Selw. 1129; 3 Ste. Com. 491–2; Gale, 388, 404, 406–8; Rosc. 514, 515; *Bamford* v. *Turnley*, 3 Best & Sm. 62; *Cavey* v. *Ledbitter*, 13 C. B. (N. S.) 470; *Hodgkinson* v. *Ennor*, 4 Best & Sm. 229; *Tipping* v. *St. Helen's Smelting Co.*, 4 Best & Sm. 608, 616; 11 H. L. Cas. 642; *Ibottson* v. *Peat*, 3 Hurl. & Colt. 644; *Cator* v. *Lewisham Board of Works*, 5 Best & Sm. 127.) **271.**

If the occupier of a house allows the filth which arises on his premises, or which he is bound to receive in his drain, to enter neighbouring premises, otherwise than by the old accustomed channel, through want of repair of the drain, he is liable in damages, though he may be ignorant of the want of repair, or even of the existence of the drain, and though he may have been guilty of no wilful neglect. (*Humphries* v. *Cousins*, L. R. 2 C. P. D. 239.) **272.**

If a man erects a building so close to the house or other building of another as to prevent the latter from enjoying the light so freely as he used, he may have redress, if he has been in the enjoyment of the light to his house or other building for twenty years, or if the person affecting his light were the person from whom he purchased. (See infra, par. 431–6.) **273.**

Remedy in damages.

The remedy in all these cases is by action for damages. **274.**

No action for diminishing another's pleasure.

An action cannot be maintained on the mere ground that the cause of action diminishes the pleasure of the party affected by it. So that the building of a wall which merely shuts out a prospect, without obstructing the light, or the opening of a window which destroys the privacy of another, is not actionable. (Selw. 1130; 3 Ste. Com. 491–2; Gale, 285; Rosc. 515. See infra, par. 438, 439.) **275.**

IV. *Of Waste.*

Definition.

Waste is that which tends to the permanent depreciation of the value of the inheritance. It is either voluntary, which is an offence of commission, as by pulling down a house: or it is permissive, which is an

Voluntary waste.

Permissive waste.

offence of omission only, as by suffering it to fall for want of necessary repairs. (Co. Litt. 53 a; 2 Bl. Com. 281; Burton, § 718.) **276.**

Different kinds of voluntary waste.

Voluntary waste chiefly consists in these things:—1. Felling or destroying trees. 2. Destroying or injuring buildings. 3. Opening mines or pits. 4. Altering the property. 5. Destroying heirlooms. (1 Cru. T. 3, c. 2, § 1.) 6. Destroying certain kinds of living creatures which are regarded as part of the inheritance. **277.**

1. Waste in trees and hedges.

For what purposes tenant for life may cut timber.

1. A tenant for life may cut down timber trees for the ordinary reparation of houses or fences; but he cannot cut down timber to build new houses or to repair those that he himself has improperly suffered to fall into decay. (1 Cru. T. 3, c. 1, § 19; Co. Litt. 53 b.)

What is timber.

Timber trees are those which serve for building or reparation of houses, such as oak, ash, and elm, of the age of twenty years and upwards. (1 Cru. T. 3, c. 2, § 5; 2 Bl. Com. 281; Co. Litt. 53 a.) By the custom of some countries certain trees not usually considered as timber are deemed to be such; as being there used for building. (1 Cru. T. 3, c. 2, § 6; 2 Bl. Com. 281; Co. Litt. 53 a.) **278.**

Destruction of germins, trees about

If a tenant for life suffers the young germins or shoots to be destroyed, or cuts down

a house, fruit trees, and fences.

willows, birch, &c., standing in the defence and safeguard of a house, or fruit trees standing in a garden or orchard, or suffers a quickset fence of whitethorn to be stubbed up or destroyed, it is waste. (1 Cru. T. 3, c. 2, § 8, 9; Co. Litt. 53 a.) **279.**

Rights of tenant for life without impeachment of waste.

Estates for life are usually given "without impeachment of waste." And where this is the case, the tenant for life has a right to fell timber and convert it to his own use, and he is entitled to the property of all timber trees blown down. (1 Cru. T. 3, c. 2, § 51, 54.) And prior to the Supreme Court of Judicature Act, 1873, he might, at Law, cut down even timber serving for shelter or ornament to a mansion-house or its grounds, or timber not fit to be felled; which is commonly called equitable waste, because it was deemed improper and restrainable in Equity, though it was permitted at Law. (Sm. Eq. Manual, 13th ed. par. 767–768 a.) But by that Act, s. 25, clause (3), it is enacted that "an estate for life without impeachment of waste shall not confer or be deemed to have conferred upon the tenant for life any legal right to commit waste of the description known as equitable waste, unless an intention to confer such right shall expressly appear by the instrument creating such estate." **280.**

Rights of tenant for years.

The prohibitions against waste apply with even greater force to tenants for years. But where the clause "without impeachment of waste" is inserted in a lease for years, it will have the same effect as when inserted in the conveyance of an estate for life. (1 Cru. T. 8, c. 2, § 12.) **281.**

2. Waste in buildings.

2. Waste may be done in buildings by pulling them down, or by suffering them to be uncovered, whereby the timbers become rotten. (1 Cru. T. 3, c. 2, § 11; Co. Litt. 53 a.) **282.**

If glass windows, though put in by the tenant himself, are broken or carried away, it is waste. So it is of wainscot benches, doors, floors, furnaces, and the like, annexed or fixed to the house either by the reversioner or the tenant. (1 Cru. T. 3, c. 2, § 13; 2 Bl. Com. 181; Co. Litt. 53 a.) **283.**

3. Waste as regards mines and pits.

3. A tenant for life or years cannot dig for gravel, lime, clay, brick-earth, stone, &c., where there are no pits open, except for the reparation of buildings or manuring of the land. A tenant for life or years may work open mines, but may not dig for any new mine. (1 Cru. T. 3, c. 2, § 14, 16; 2 Bl. Com. 282; Co. Litt. 53 b, 54 b.) **284.**

4. Altering the property.

4. If a tenant converts one kind of land into another, or makes alterations in the

premises, though they greatly enhance the value of it, it is waste; because he has the use, and not the dominion; and the owner has a right to have the old features and associations of the property unaltered. So that an action may be maintained even for inclosing and cultivating waste land, or pulling down old buildings and substituting new ones of greater value. (Ad. Torts, 120–1; Sm. Law of Prop. 5th ed. 3395; Coote, Landl. and Ten. 232–3.) **285.**

5. Destruction of heirlooms.

5. The destruction of heirlooms is waste. (1 Cru. T. 3, c. 2, § 20.) **286.**

6. Waste as regards living creatures.

6. Waste may also be committed in ponds, dove-houses, warrens, parks, and the like, by so reducing the number of creatures therein that there will not be sufficient for the reversioner. (2 Bl. Com. 281; Co. Litt. 53 a.) **287.**

Waste by tenants in fee, in tail, for life, or for years.

Tenants in fee or in tail may commit every kind of waste. **288.**

Tenants for life are punishable for waste, whether commissive or permissive, unless their estates are made without impeachment of waste. **289.**

A tenant for years is liable for commissive waste, unless his interest is created without impeachment for waste; and he is bound to take reasonable care of the property; but a

tenant at will or from year to year is not liable for permissive waste. (Ad. Torts, 119; Sm. Law of Prop. 5th ed., par. 3398–3404; Ad. Con. 843.) **290.**

A tenant for life or years is liable for commissive waste by a stranger. (Ad. Torts, 127.) **291.**

Inspection of premises by lessor.

A lessor has a right of inspecting to see if there is commissive waste; and if the lessee prevents the inspection, he may be made to pay substantial damages, even though no waste may have been done. (Ad. Torts, 4th ed. 247.) **292.**

Waste by ecclesiastical persons.

Ecclesiastical persons, being considered in most respects as tenants for life of the lands which they hold jure ecclesiæ, are disabled from committing any kind of waste. (1 Cru. T. 3, c. 2, § 71.) But the right of a rector to recover from the representatives of his predecessor damages for waste is confined to the case of dilapidations to houses, buildings, walls, and fences, and does not extend to waste committed by digging gravel in the glebe. (*Ross* v. *Adcock*, L. R. 3 C. P. 655.) **293.**

Waste by the lord or tenants of manor.

Every copyholder may, of common right, as incident to the grant, take housebote, hedgebote, and ploughbote, upon his copyhold; and the lord must leave sufficient for

that and the reparation of the houses. And there may be a custom for the tenants to fell timber for their own use, though not needed for repairs. But, by the general custom of most manors, timber is the property of the lord; and a copyholder cannot commit any kind of waste, unless there is a particular custom to warrant it. A copyholder for life is punishable for permissive waste. (1 Cru. T. 10, c. 3, §§ 3, 7, 15; *Blewett*, app., *Jenkins*, resp., 12 C. B. (N. S.) 16.) **294.**

By reason of his ownership of the soil, subject only to the interests of the commoners, the lord may take and sell gravel, marl, loam, and the like, in the waste, and make any other use of the soil, so long as he does not infringe on the commoners' rights. (*Hall* v. *Byron*, L. R. 4 Ch. D. 667, 675.) **295.**

V. *Of Subtraction.*

Subtraction is the withdrawal of, or the neglect to perform any suit, duty, custom, or service, such as the oath of fealty, suit of court, rent, or other service due to the lord of the fee. For this, the remedy is, distress by way of pledge to enforce performance. (3 Ste. Com. 498–500.) **296.**

VI. *Of Disturbance.*

Disturbance

Disturbance is usually a wrong done by hindering the owner of a hereditament in the regular and lawful enjoyment of it. **296a.** Such as—

of franchise,

1. The disturbance of franchise, for which an action will lie. **297.**

common,

2. The disturbance of common, by putting on the cattle of a stranger, or by putting on creatures which are not commonable, or more than the proper number of creatures, or by destroying the common, or ploughing up the soil, erecting fences, driving out the cattle, &c.; for which an action will lie, and in some instances a distress. **298.**

right of way,

3. The disturbance of a right of way; for which an action for damages will lie. **299.**

tenants,

4. The disturbance of tenants, by the driving them away from the estate; for which a landlord has an action for damages. **300.**

and patronage.

5. The disturbance of patronage, which is an obstruction of a patron in presenting to a benefice. (3 Ste. Com. 501–6.) **301.**

VII. *Other Injuries to Real Property.*

Endangering another's buildings.

It may here be observed that a person who pulls down a house or wall which touches

the house or wall of another person is liable for any damage arising from want of due care and skill and proper precautions. And if a person makes an excavation on his land close to his neighbour's house, in an improper manner, or without giving his neighbour notice and opportunity to protect it, he will be responsible for any damage thereby occasioned, if his neighbour's house has been erected long enough to have acquired a right of support. (Ad. Torts, 86–7; Rosc. 526, 528; Gale, 314. And see infra, par. 442.)

302.

Introduction of explosive materials.

A person is responsible for damage occasioned by his bringing explosive materials into a building. And a tenant is responsible for any accident from gas, arising from not properly turning the stopcocks. And the gas company is not bound to stop the supply on receiving notice that no more gas is required; but it is the business of the occupants to prevent it from entering, if they wish to exclude it. (Ad. Torts, 132–3.)

Gas.

303.

A gas company is liable for an escape of gas, if they contract, but fail, to supply a proper service-pipe to convey gas from the main outside to a meter inside the plaintiff's premises, in consequence of which an escape

takes place, and an accident is caused. (*Burrows* v. *March Gas & Coke Co.*, L. R. 7 Ex. (Ex. Ch.) 96. See par. 34 a.) **304.**

Fire.

A person is not liable for the consequences of a fire accidentally beginning on his premises. (Ad. Torts, 136; 6 Anne, c. 31, ss. 6, 7; 12 Geo. III. c. 73, s. 37; 14 Geo. III. c. 78, s. 86.) But if a fire is negligently lighted or kept by a person or his servant, he will be liable for any injury thereby occasioned to his neighbour's premises. (Rosc. 531.) **305.**

Damages for the obstruction of a right.

Whenever the enjoyment of a right incident to the possession of land or a customary right has been tortiously obstructed, and the repetition of the tortious act would tend to establish an adverse legal right, substantial damages are recoverable, even though no actual damage of any other kind has been sustained. (Ad. Torts, 14; Mayne, 256; *Harrop* v. *Hirst*, L. R. 4 Ex. 43.) **306.**

Damages recoverable by lessee and reversioner.

Damages are recoverable by a lessee in respect of an injury by a tortious act to his possessory interest; and if the repetition of the act would tend to the establishment of a prescriptive right permanently injurious to the inheritance, or if a nuisance is committed

which is permanent or injurious to the reversioner, damages are also recoverable by the reversioner. (Ad. Torts, 15; Rosc. 513; Mayne, 256.) **307.**

CHAPTER II.

OF INJURIES TO PERSONAL PROPERTY, AND TO PECUNIARY CIRCUMSTANCES.

PART II. TIT. II. CAP. II.

Deprivation of possession and damage.

Unjust taking or detainer.

THE rights of personal property in possession are liable to two species of injury: the deprivation of the possession; and the abuse or damage of the chattels, while the possession continues in the legal owner. The deprivation of the possession is also divisible into two branches: first, the unjust taking them away; and secondly, the unjust detaining them, though the original taking away might be lawful. (3 Bl. Com. 144; Broom Com. 776.) **308.**

Redress for unjust taking.

There are two descriptions of redress for the unjust taking. The first is the restitution of the specific chattels taken, with the payment of damages for the loss or injury occasioned by the temporary deprivation of the possession. The second is the giving a pecuniary equivalent in the shape of damages for the permanent loss of the articles taken. (See 2 Bl. Com. 145.) **309.**

Injuries to dogs and cats.

A person who destroys another's dog or cat is in general liable to an action. But if a dog, when loose, is actually attacking a man, he may destroy it, at the time, in self-defence. (Ad. Torts, 2nd ed. 160.) And if a dog chases conies in a warren, or deer in a park, or sheep in a fold, or fowls in a poultry-yard, he may be killed by the owner, at the time, to prevent their destruction. But it may not be killed after the chasing and the peril have ceased. (Ad. Torts, 2nd ed. 268.) Dogs trespassing in pursuit of animals feræ naturæ may not ordinarily be destroyed, even though the owner of the dog has received notice that trespassing dogs will be shot. (Ad. Torts, 2nd ed. 310, 314.) If an action is brought for the destruction of a dog, its character and mischievous propensities may be considered, in mitigation of damages. (Ad. Torts, 2nd ed. 315.) If a person sets a trap, though it be for foxes or vermin, and baits it with strong smelling meat, and places it so near to a highway or public path, or to the premises of his neighbour, as to be likely to attract dogs and cats while passing along the highway or path, or his neighbour's dogs and cats, and they are injured by getting into the trap, he is

liable. (Ad. Torts, 3rd ed. 162; Dixon, 295; Locke, 55.) **310.**

Injuries by dogs to sheep or cattle.

By the common law, a man was not liable for injuries done by his dog, unless he had a previous knowledge of his mischievous propensities. (Locke, 249.) But by the stat. 28 & 29 Vict. c. 60, s. 1, it is enacted that "the owner of every dog shall be liable in damages for injury done to any cattle or sheep by his dog; and it shall not be necessary for the party seeking such damages to show a previous mischievous propensity in such dog, or the owner's knowledge of such previous propensity, or that the injury was attributable to neglect on the part of such owner. Such damages shall be recoverable in any Court of competent jurisdiction by the owner of such cattle or sheep killed or injured. Where the amount of the damages claimed shall not exceed 5*l.*, the same shall be recoverable in a summary way before any justice or justices sitting in petty sessions under the provisions of the Act 11 & 12 Vict. c. 43." **311.**

The 2nd section shows who is to be deemed the owner of the dog. **312.**

Horses are included in the word "cattle." (*Wright* v. *Pearson*, L. R. 4 Q. B. 582.) **313.**

Destruction of game by dogs.

If game is destroyed by a dog, which its owner knows to have a propensity to destroy game, its owner is liable to an action by the owner of the ground on which the game is destroyed. (*Read* v. *Edwards*, 17 C. B. (N. S.) 245.) **314.**

Ownership of creatures feræ naturæ.

A qualified property may be acquired in creatures feræ naturæ—that is, creatures which are of so wild a nature as to shun the dominion of man. (Locke, 2.) Some of these creatures are called game. Game, strictly so called, are hares, pheasants, partridges, grouse, heath and moor game, black-game, and bustards. (Locke, 56.) But the word game has a more extensive signification for certain legal purposes; sometimes including woodcocks, snipes, rabbits, and eggs of certain birds. (Locke, 56, 95, 99, 238.) **315.**

There may be a qualified property in game, per industriam, propter impotentiam, ratione soli, and propter privilegium. (Locke, 2.) **316.**

The first arises where the creatures are tamed or confined. The second occurs in the case of the young of these creatures, before they can fly or run away. The third is the case of a landholder or tenant having a right to game, by reason of its being on his

land. The fourth is the case of a privilege of taking and killing game, by virtue of the franchise of a forest, chase, park, or free warren, as distinguished from a mere hare or rabbit warren. (Locke, 3, 5, 6, 7, 8, 10, 11.) **317.**

When creatures are tamed or confined, or unable to fly or run away because too young, an action will lie against any one who detains them or destroys them. (Locke, 3.) And under such circumstances, they become chattels personal of the owner, and go to his executor, and not to his heir. (Locke, 5.) **318.**

Whilst creatures feræ naturæ are on a man's private ground, but no longer, they are his property. (Locke, 6; Ad. Torts, 2nd ed. 181–2.) And he may grant to another the right of taking and killing, or of taking, killing, and carrying away the game; or he may convey away his land, reserving, or rather taking back, such a right to himself. (Locke, 8.) But as between a landlord and his tenant, by the common law, the game belongs to the tenant, and not to the landlord, unless he reserves it in the lease. (Locke, 8, 111; see *Coleman*, app., *Bathurst*, resp., L. R. 6 Q. B. 366.) **319.**

Under a reservation of a right of shooting

and sporting, rabbits are included. (*Jeffryes* v. *Evans*, 34 L. J. (N. S.) 261.) If a stranger starts game, properly so called, in a chase or free warren, and hunts it into another liberty, it still belongs to the owner of the chase or free warren. (Locke, 30.) But if conies, *i.e.*, rabbits, are out of a free warren, no person has any property in them; and a man may justify killing them, if they eat up his corn. (Locke, 32.) **320.**

The lord of a manor always had a common law right to the game on the wastes and commons, as he is the owner of the soil, subject to the commonable rights; and this is confirmed to him by the stat. 1 & 2 Will. IV. c. 32. **321.**

A mere right of common gives the commoner no right to destroy or drive off the rabbits; but if the lord surcharges the common with rabbits, a commoner may maintain an action against him. (Locke, 34, 35; Ad. Torts, 2nd ed. 89.) **322.**

A man cannot have an action for another man's rabbits or pigeons coming upon his ground, and doing damage there (*a*); because they are no longer the other's than while

(*a*) To this there may be exceptions. And in connection with this subject, consider the principle laid down infra, par. 450.

they are in the warren or place where he has a right to keep them; but they may be destroyed by the owner of any ground on which they may happen to be. (Locke, 35; Ad. Torts, 2nd ed. 224.) **323.**

Where a lease contains a stipulation that the tenant shall not shoot, hunt, or sport on the land, or destroy any game, but will use his best endeavours to preserve the same, and will allow his landlord or friends at any time to hunt, shoot, or sport on the land, and the tenant executes the lease on the faith of a promise by the landlord that he will destroy the rabbits by which the land was overrun, if the landlord does not perform his promise, he is liable to an action for the damage done by the rabbits. (*Morgan*, app., *Griffith*, resp., L. R. 6 Ex. 70.) **324.**

In some cases of inclosure of the wastes and commons, the right of the lord to the game is secured; in others, it is not. (Locke, 36.) **325.**

There is no distinction between preserves and any other inclosures, except that if a man makes a great disturbance (as by firing off guns) for the purpose of driving his neighbour's game from his neighbour's preserves, or his wild-fowl from his decoy, it is actionable. (Locke, 39, 40.) But no action

will lie for the mere disturbance of rooks in a rookery. (Locke, 40, 41.) **326.**

The principal Game Act ~~is~~ was the stat. 1 & 2 Will. IV. c. 32. By ss. 7–11, it is provided that in the case of underleases and agreements made before the 5th October, 1831, the landlord shall have the right of entering, and authorizing any other person to enter, to kill or take away game, and the tenant shall not have such a right, except where expressly allowed to him, except where a fine shall have been taken, or except where the term shall have been for more than twenty-one years. But this was not to prejudice any statute or agreement to the contrary, nor the rights of any lord or owner of a forest, chase, or warren. (Locke, 66–8, 110–114.) **327.**

Ownership of game, when killed.

Game killed on the land of A. by himself, or by his servant or a trespasser, is A.'s property. (*Blades* v. *Higgs*, 11 H. L. Cas. 621.) **328.**

Trade-marks.

There may be a property in a trade-mark, *i.e.*, an exclusive right to use it. And this may be sold and transferred, on a sale of the right to manufacture the goods which it designates. And if a person has adopted a particular mark in trade or business, to denote that the goods were made by him, and the mark has become understood in the

* By the Statute 43 & 44 Vic. c 47. the Ground Ga

trade, and his right is infringed by the use of a mark by another person, either precisely the same, or so similar that the public in general would be misled, he is entitled to an action for the deceit, even without showing any specific damage. (Ad. Torts, 649–650; Tudor Ca. on M. L. 487–500; Rosc. 559; *Leather Cloth Co.* v. *American Leather Cloth Co.*, 11 H. L. Cas. 523.) **329.**

Injury to property by another's negligence.

Where the property of one person is injured in consequence of another neglecting to do that which he ought to have done, the latter is liable for the injury: as where A.'s horse is injured by B.'s horse, which trespasses into A.'s field, in consequence of B. neglecting to keep his fence in order. (*Lee*, app., *Riley*, resp., 18 C. B. (N.S.) 722; *Burrows* v. *March Gas and Coke Co.*, L. R. 5 Ex. 67; 7 Ex. (Ex. Ch.) 96.) **330.**

Slander of title to another's land or goods.

If a man falsely and maliciously, and without reasonable and probable cause, slanders the title to lands or chattels about to be sold, and people are thereby deterred from buying, or are led to give a less price, the owner will be entitled to compensation in damages. (Ad. Torts, 608; Broom Com. 733–4; 3 Ste. Com. 467; Selw. 1258, 1269; Rosc. 57; *Wren* v. *Weild*, L. R. 4 Q. B. 730, 734.) **331.**

Slander of

An untrue statement disparaging a per-

son's goods, published without lawful occasion and causing him special damage, is actionable. (*Western Counties Manure Co.* v. *Lawes Chemical Manure Co.*, L. R. 9 Ex. 218, 222.) **332.**

quality of them.

Statement injurious to a person in his profession, business, or employment.

It is an actionable wrong, if one person states of another, who is engaged in any profession, business, or employment, anything, whether it is slander or a statement of any other kind, the natural consequence of which would be to injure him in his profession, business, or employment, and there is either specific evidence of such injury, or adequate general evidence thereof. (*Riding* v. *Smith*, L. R. 1 Ex. D. 91.) **333.**

Mistakes in telegrams.

Where a telegraph company, by making a mistake in a message, occasion a loss to the sender, he is entitled to damages. And (though otherwise decided in *Playford* v. *United Kingdom Telegraph Co.*, L. R. 4 Q. B. 706, and *Dickson* v. *Reuter's Telegraph Co.*, L. R. 2 C. P. D. 62; 3 C. P. D. (Ap.) 1; on the grouud of want of contract between the company and the sendee) the author conceives it to be perfectly clear on principle, and the American Courts have decided, that where a telegraph company, by making a mistake in a message, occasion an injury to the sendee, they are liable to him, on the

ground of tort, though not on the ground of contract. But the sender is not responsible to the sendee for a mistake made by a telegraph clerk in transmitting a message correctly written for transmission. (*Henkel* v. *Pape*, L. R. 6 Ex. 7.) **334.**

PART III.

OF PRIVATE RIGHTS AND WRONGS CONCERNING CERTAIN RELATIONS OF LIFE.

TITLE I.

DOMESTIC RELATIONS OF LIFE.

CHAPTER I.

HUSBAND AND WIFE.

SECTION I.

Of the Marriage Contract.

I. Contract to marry.

I. A CONTRACT to marry must be reciprocal, and must be obligatory upon both parties, except that an infant may sue, though incapable of being sued, on such a contract. (Chit. Con. 487.) **335.**

Such a contract may be evidenced by a verbal promise, or even by unequivocal conduct alone. (Ad. Con. 744; Chit. Con. 487.) **336.**

An action may be maintained on a contract to marry, in case of default at the time specified, or in case of an absolute refusal being made before the time, or, if no time was specified, within a reasonable time after

request; and a large pecuniary compensation may be recovered for the misery occasioned to the disappointed party. (Ad. Con. 743–5; *Frost* v. *Knight*, L. R. 7 Ex. (Ex. Ch.) 111.) **337.**

Fraud used by the plaintiff in procuring the promise, *e.g.*, false representation or fraudulent concealment as to the pecuniary circumstances or previous life of the plaintiff, or a secret disposition of the plaintiff's property, or a determination on the part of the lady, when plaintiff, to settle her property to her separate use, contrary to the defendant's wish, or the impotence or the bad character of the plaintiff subsequently discovered, or the subsequent bad conduct of the plaintiff towards the defendant, are good grounds of defence to an action for breach of promise of marriage. (Chit. Con. 489-491; Ad. Con. 746.) But if the plaintiff is sane at the time of the promise, it has been held that it is no answer to an action for breach of it, that he or she was before of unsound mind, and as such, legally confined in a lunatic asylum. (*Baker* v. *Cartwright*, 10 C. B. (N. S.) 124.) **338.**

II. Requisites to marriages.

II. There are certain requisites to a marriage contract, without which it may be set aside as null and void. **339.**

Thus: 1. Corporal capacity is necessary. Impotency, at the time of the marriage, is a ground for avoiding it. (Macq. 341-2.) **340.**

1. Corporal capacity.

2. The man must not have another wife, or the wife another husband, living at the time. (Macq. 343-4.) **341.**

2. Unmarried.

3. If either party is under the age of seven years, the marriage is void. If the husband is above seven and under fourteen years of age, or the wife is above seven and under twelve, the marriage is not absolutely void; but the husband on attaining the age of fourteen, or the wife, on attaining the age of twelve, and not before, may disagree to and avoid it; but if at that age they agree to continue together, they need not be married again. No promise to marry made by a person under the age of twenty-one years, is binding upon such a person, though a promise to marry by the opposite party will bind him or her, if of age. (Macph. 168; Ad. Con. 756-7, 937.) **342.**

3. Sufficient age.

4. Soundness of mind is necessary; the marriage of an idiot or lunatic, except during a lucid interval, is void. (Macq. 342.) **343.**

4. Sound mind.

5. Marriages since the 31st of August, 1835, within the prohibited degrees of con-

5. Not within the prohibited degrees of

PART III. TIT. I. CAP. I. SEC. I.

consanguinity or affinity.

sanguinity or affinity, are also void. (Macq. 327; Ad. Con. 757.) Thus, marriages, between persons who are lineally related to each other are void; and so also are marriages between persons collaterally related to each other in the second or third degree according to the mode of computation in the civil law, whether they be related by consanguinity or by affinity. Thus, a man cannot marry ~~either~~ his sister ~~or his wife's sister~~; for both are related to him in the second degree; the one by consanguinity, the other by affinity. Nor can he marry his sister's daughter, or his wife's sister's daughter; for both are related to him in the third degree. But he may marry his first cousin; for she is only related to him in the fourth degree. The relations by consanguinity of the wife are always related by affinity to the husband; and the relations by consanguinity of the husband are always related by affinity to the wife. But the relations by consanguinity of the husband are not, as such, related, even by affinity, to the relations by consanguinity of the wife; and hence two brothers may marry two sisters, or father and son, a mother and daughter. Nor is the husband, as such, related, even by affinity, to those who are only related to

Repealed.

the wife by affinity; and therefore a man may marry his wife's brother's wife. (2 Ste. Com. 255–6.) **344.**

The prohibitions as to collaterals extend even to the half blood, and to illegitimate children. (2 Ste. Com. 256.) **345.**

III. Modes of proceeding towards celebration of marriage.

III. There are four modes of proceeding towards the celebration of marriage. **346.**

1. By banns.

1. By a publication of banns upon three successive Sundays, in the church or chapel where the marriage is to be solemnised, according to the rites of the Church of England. **347.**

2. By ecclesiastical licence.

2. By a licence from the ecclesiastical authority, that is, a special licence from the Archbishop of Canterbury, or a common licence from the ordinary of the place or his surrogate. **348.**

In the case of a licence, one of the parties must have had his or her usual place of abode, for fifteen days immediately preceding, in the parish or chapelry where the church or chapel in which the marriage is to be solemnised is situate. **349.**

Whether by banns or licence, the marriage must take place between eight and twelve o'clock in the forenoon, except in the case of a special licence, and be solemnised by a person in holy orders, and before not less

than two other credible witnesses. If the intended husband or wife, not being a widower or widow, is under the age of twenty-one, and his or her parent or guardian openly signifies disapproval at the time the banns are published, the publication is void.

350.

And in the case of a licence, one of the parties must make oath as to his or her belief that there is no lawful impediment; and that one of them has had his or her usual place of abode for fifteen days immediately preceding, within the parish or chapelry within which the marriage is to be solemnised; and, where one of the parties, not being a widower or widow, is under the age of twenty-one years, that the consent of the father, or, if the father is dead, of the guardian, or if there is no guardian, then of the mother, being unmarried, or, if no mother unmarried, then of the guardian appointed by the Court, has been obtained.

351.

3. By the superintendent-registrar's certificate, without licence.

3. By the superintendent-registrar's certificate, without licence, after a notice given to him of the intention to marry in a specified place; which notice is entered in a book, called "the marriage notice book," and is put up in his office during

twenty-one successive days after being so entered. **352.**

On the issuing of the certificate, the marriage may be solemnised, before a registrar and two or more credible witnesses, in a building registered as a place for the solemnisation of marriage, or at the office of the superintendent-registrar, or according to the rites of the Church of England in a church or chapel within the superintendent-registrar's district, or according to the usages of the Quakers or Jews, if both parties are of those persuasions respectively. **353.**

4. By the superintendent-registrar's certificate with licence, which is issued after a notice similar in most respects to the notice in the previous case. But the notice in this case need not to be put up in the office of the superintendent-registrar; and the certificate may be obtained after the expiration of one whole day, instead of twenty-one days next after the entry of the notice. **354.**

4. By the superintendent-registrar's certificate, with licence.

The marriage in this case may be solemnised according to any of the four methods before stated, except that the superintendent-registrar cannot grant a licence for marriage in a church or chapel of the Church of England. **355.**

A person whose consent would be required

to a marriage by ecclesiastical licence may forbid the issue of the certificate, by writing "forbidden" opposite the entry of the notice; or a caveat may be entered by any person against the grant of the certificate or licence. **356.**

Such are a few of the numerous points connected with proceedings towards the celebration of marriage. It must suffice to add that the non-observance of some of the regulations subjects to a penalty, the infringement of others is punishable as a felony, and the violation of others renders the marriage void. (See 2 Ste. Com. 257–268, to which most valuable work the reader is referred for further information on this subject.) **357.**

IV. Decree declaratory of validity of marriage, legitimacy, &c.

IV. The Divorce Division of the High Court may, on petition of a natural-born subject of the Queen, domiciled in England or Ireland, or claiming any real or personal estate situate in England, make a decree declaratory of the validity or invalidity of the marriage of such person, or of his father and mother, or of his grandfather and grandmother, or of his legitimacy or illegitimacy, or of his right to be deemed a natural-born subject of the Queen. (21 & 22 Vict. c. 93, ss. 1, 2.) **358.**

V. When marriages were allowed to be celebrated in a more clandestine manner, suits for jactitation of marriage, that is, for boasting of being married to a person, contrary to the fact, were of frequent occurrence; but they are now unheard of, though they may still be instituted. (Macq. Div. 321–2.) **359.**

V. Suits for jactitation of marriage.

SECTION II.

Of the Consequences of the Marriage, as connected with Common Law.

In the view of the common law, the wife has no separate existence; she and her husband are in law but one person. And hence she has in general no power or capacity to contract during coverture, so as to render herself personally liable. To this, however, there are these exceptions: 1. A married woman may be a sole trader in the City of London, and she is recognisable as such in the City Courts: 2. If the husband is under sentence of transportation or penal servitude, or is an alien enemy, or if she is judicially separated and continues to live apart, she may contract and sue and be sued

Unity of person.

Incapacity of the wife to bind herself by contract.

as a feme sole: and in these cases she may become a bankrupt. (Sm. Merc. Law, 18; Sm. Con. 285; Ad. Con. 764, 770–1, 779; Chit. Con. 167–8.) **360.**

Wife's power to bind her husband by contract suitable to the fortune and degree of the husband.

Unless there is evidence to the contrary, it is presumed that a wife who resides with her husband is authorised by him as his agent to bind him by contracting for necessaries, such as food, clothes and furniture, according to the apparent circumstances of the husband and wife; but that a wife who is living separately from her husband has no such authority, unless the separation was by her husband's unjustifiable compulsion, or occasioned by his misconduct, or by mutual consent, and she has no provision which is adequate for her support, or has been accepted by her as adequate. In that case, the husband is responsible for necessaries for her, even for necessary legal advice. (Sm. Con. 415; Ad. Con. 5th ed. 767–770, 775–7; 7th ed. 135–6; Bright, 6–12; Rosc. 382–4; Chit. Con. 153, 160–5; *Biffin* v. *Bignell*, 7 Hurl & Norm. 877; *Baker* v. *Sampson*, 14 C. B. (N. S.) 383; *Jolly* v. *Rees*, 15 C. B. (N. S.) 628; *Wilson* v. *Ford*, L. R. 3 Ex. 63; *Bazeley* v. *Forder*, L. R. 3 Q. B. 559; *Richardson* v. *Du Bois*, L. R. 5 Q. B. 51, where the husband was a lunatic; *Phillipson* v.

Hayter, L. R. 6 C. P. 38; *Eastland* v. *Burchell*, L. R. 3 Q. B. D. 432.) **361.**

Although a married woman, residing with her husband, has an implied authority from her husband to order food, clothing, furniture, and other necessary articles, yet, if her orders are of such a description as, under the circumstances, naturally to raise a doubt whether her husband would have authorised her to give them, the tradesman is bound to satisfy himself that they were so authorised. (See Ad. Con. 767–8; Rosc. 383; Chit. Con. 154, 157.) **362.**

If the wife, with the concurrence of her husband, carries on a separate trade, she has in general an implied authority to order goods for the purposes of that trade. (Chit. Con. 9th ed. 160.) **363.**

A husband cannot be charged with goods supplied to his wife after an express warning to the tradesman not to trust her, unless he has wrongfully turned her away, and the goods are necessary. (Chit. Con. 158–163; Ad. Con. 774–5, 778.) Nor is a husband liable for money borrowed by his wife, without his authority, even for necessaries. (Chit. Con. 158–9, 163; Ad. Con. 778.) **364.**

Without the authority of her husband, a married woman cannot bind her husband,

by drawing, making, indorsing, or accepting bills or notes; nor can she bind herself in that way (except in Equity in respect of her separate estate), even though she lives apart from him, and has a separate maintenance by deed. (Byles, 58; Chit. B. 14–16.) **365.**

Liability of a man for debts contracted by a woman held out to be his wife.

Where a man, whether married or single, allows a woman, to whom he is not married, to assume his name as his wife, or where he usually lives with her and treats her as if she were his wife, he is liable for debts contracted for necessaries supplied to her or her order otherwise than on her own credit, even by a tradesman or other person who was aware of the fact that she was not his wife, if the debts were contracted during the continuance of the connexion, or even after it ceased, so long as the creditor who trusted to the supposed coverture or the connexion at the time it subsisted, was not aware of the subsequent separation. (Chit. Con. 8th ed. 162; Ad. Con. 6th ed. 774; Rosc. 11th ed. 318.) **366.**

Order of protection of property of wife who is deserted.

A wife deserted by her husband may apply to a police magistrate, to justices in petty sessions, or to the Divorce Court, for an order to protect any money or property which she may acquire by her own lawful industry, or of which she may become possessed, after

such desertion, against her husband or his creditors, or any person claiming under him; and such magistrate, or justices, or Court, if satisfied of the fact of such desertion, and that the same was without reasonable cause, and that the wife is maintaining herself by her own industry or property, may make and give to the wife an order protecting her earnings and property acquired since the commencement of such desertion, from her husband and all creditors and persons claiming under him, and such earnings and property will belong to the wife as if she were a feme sole. (20 & 21 Vict. c. 85, s. 21. As to the discharge of such an order, see 27 & 28 Vict. c. 44.) **367.**

Wife judicially separated to be considered as a feme sole.

In every case of a judicial separation, the wife will, from the date of the sentence and whilst the separation continues, be considered as a feme sole, with respect to property of every description which she may acquire or which may come to or devolve upon her; and such property may be disposed of by her in all respects as a feme sole; and on her decease, the same, in case she dies intestate, will go as the same would have gone if her husband had been then dead; and if the wife again cohabits with her husband, all such property as she may be entitled to

when such cohabitation takes place will be held to her separate use, subject, however, to any agreement in writing made between herself and her husband whilst separate. (20 & 21 Vict. c. 85, s. 25.) And the wife, whilst so separated, will be considered as a feme sole for the purposes of contract, and wrongs and injuries, and suing and being sued in any civil proceeding (s. 26), notwithstanding any subsequent variation or reversal of the judicial separation. (21 & 22 Vict. c. 100, s. 8.) **368.** (*a*).

Action for libel.

In consequence of the statute 20 & 21 Vict. c. 85, ss. 21, 26, a wife who has been deserted by her husband, and has obtained an order of protection, may sue in tort in her own name, as well as in contract; and therefore she may bring an action for libel. (*Ramsden* v. *Brearley*, L. R. 10 Q. B. 147.)

369.

Husband's interest in the wife's real estate

The husband takes a freehold interest, during the joint lives of himself and his wife,

(*a*) For modifications made in the law by the stat. 33 & 34 Vict. c. 93, and 37 & 38 Vict. c. 50, see Appendix, where it was thought better to print these enactments rather than in the text, as they may and ought to be repealed and re-enacted, or modified or qualified. In their present form they are quite unfit to be applied to the lower classes. Tradesmen are often defrauded by the operation of these statutes.

in land belonging to her in fee simple, in tail, or for life. (Sm. Law of Prop. 5th ed. par. 3195.) **370.**

And if he has had issue by her capable of inheriting the property, he is entitled, on her death, to an estate by the curtesy, that is, an estate for life in lands or tenements of which she was tenant in fee or in tail in possession. (See Sm. Law of Prop. 5th ed. par. 451.) **371.**

Wife's interest in the husband's real estate.

On the other hand, the wife becomes entitled, on the husband's decease, to an estate in dower, that is, an estate for life in lands or tenements of which he dies entitled for any estate of inheritance in possession, unless the title to dower has been prevented, barred, or lost. And she is also entitled to a third of his personalty, if he dies intestate leaving issue, or a moiety, if he dies intestate without issue. (See Sm. Law of Prop. 5th ed. par. 470–1, 1411, 1412.) **372.**

Husband's interest in the wife's chattels real.

The wife's chattels real vest in the husband sub modo. Thus, he is possessed of his wife's term for years, and entitled to the rents and profits; and he may alien it; or it will belong to him absolutely if he survives the wife. (See Sm. Law of Prop. 5th ed. par. 3196.) **373.**

Husband's interest in

As to chattels personal *in possession* which

the wife's chattels personal.

the wife has in her own right, as ready money, jewels, household goods, and the like, the husband has an immediate and absolute property therein by the marriage, which never can again revest in the wife or her representatives. But chattels personal, en autre droit, as executrix or administratrix, &c., do not belong to the husband, though he survive, but go to the administrator de bonis non of the wife. (2 Bl. Com. 435; Co. Litt. 351 b; 1 Bright, 34, 39; Chit. Con. 151.) **374.**

As to the wife's chattels personal or *choses in action*, which comprise debts, legacies, residuary personal estate, money in the funds, money received by a person to be appropriated to her use, &c., these the husband may have, if he reduces them into possession. They then become absolutely and entirely his own, and go to his executors and administrators, or as he bequeaths them by will, and do not revest in the wife. But if he dies before her, and before he has released them or reduced them into possession, so that at his death they still continue *choses in action*, they will survive to the wife, whether against the personal representatives of the husband, or against his creditors in bankruptcy, or against his assignees for

valuable consideration. If he survives her, he will not have them by survivorship, as he would have a chattel real, except in the case of arrears of rent due to the wife before her coverture, which in case of her death are given to the husband by the stat. 32 Hen. VIII. c. 37; but he will still be entitled to the *choses in action* as her administrator, and may in that capacity recover such things in action as became due to her before or during the coverture. (2 Bl. Com. 434–5; Co. Litt. 351 b; Ad. Con. 760–1; Sm. Con. 280–1; Chit. Con. 149, 150.) On taking out administration to her estate, he will become entitled as her administrator, to all her personal estate which was outstanding and unrecovered at her death. And if he does not take out administration to her estate, but some other person does, the husband will be entitled to any surplus which may remain after paying the wife's debts. If the husband dies before he or some other person has administered to her estate, his personal representatives may take out letters of administration to her estate, and recover all her property in action and unrecovered at her death, even though such property was reversionary at her death, and in fact did not cease to be so until after the death of

the husband (as where he died in the lifetime of a prior taker of the property); or if the personal representatives of the husband do not take out administration to her estate, any other personal representative of the wife may recover such property. And such personal representatives are trustees for the persons beneficially entitled to his general personal estate, under his will, or under the statutes of distribution, or under the statutes relating to bankruptcy, or otherwise, as the case may be, as to any surplus which may remain after paying the wife's debts. (See 1 Bright, 36, 41–2, 72, 78–87; 1 Wms. Ex. 339, 742; *Drew* v. *Long*, 22 L. J. (N. S.) 717 (Ch.); *Atty.-Gen.* v. *Partington*, 1 Hurl. & Colt. 193; *Fleet* v. *Perrins*, L. R. 3 Q. B. 536; 4 Q. B. (Ex. Ch.) 500.) **375.**

Wife's liabilities before marriage.

Upon the marriage, before the stat. 33 & 34 Vict. c. 93, s. 12, the husband became liable to the wife's ante-nuptial contracts. But on her death, his liability ceased, except as her administrator, unless judgment had been recovered against husband and wife in her lifetime. If he survived her, and took out administration, he was liable to be sued on them, as his wife's administrator. If she survived him, her liability revived, in case nothing had been done to put an end to the

contract, during the continuance of the marriage. (Sm. Con. 280, 281; Ad. Con. 764, 783; 2 Bright, 1–3; Chit. Con. 151.) **376.**

As regards liabilities incurred by women before marriage, the law seems now to stand thus:

1. In the case of women married before the passing of the stat. 33 & 34 Vict. c. 93 (*a*), August 9, 1870, the husband is liable, by the common law, for debts contracted by his wife before marriage. **377.**

2. In the case of women married since August 9, 1870, and before the passing of the stat. 37 & 38 Vict. c. 50 (*b*), July 30, 1874, the husband is not liable for such debts, but the wife is liable. **378.**

3. In the case of women married since July 30, 1874, the husband is liable, if jointly sued, for debts contracted by his wife before marriage, or for damages for any tort committed by her before marriage, or for the breach of any contract made by her before marriage, in respect and to the extent of certain specified property of the wife, or by reason and to the extent of a confession of liability by the husband, or (to the extent of the property of the wife) by reason of his not pleading exemption from liability. And

(*a*) See page 154, note (*a*), and Appendix. (*b*) See *id.*

the wife is liable jointly, so far as he is sued with her and liable. And she is liable separately, so far as she is sued separately, or so far as he is not liable, if they are sued jointly. **379.**

Action against a married woman.

If a married woman is sued, as a feme sole, for a debt contracted by her after marriage, and coverture is not pleaded, or not proved if pleaded, judgment may be given against her. And in such a case, before the Debtors' Act, 1869, she was liable to be imprisoned for the debt, even without having separate estate; though she could afterwards get discharged. But the Debtors' Act, 1869, ss. 4 and 5, applies to a married woman, and exempts her (as it exempts a man) from imprisonment for debt, with the exception there mentioned, and authorises an order to be made against her for payment by instalments in such a case as that above supposed; and proof of means is not necessary on a mere order for payment, though, if she has separate estate, that will be taken into account, even at Law, in directing the mode of payment. (*Poole* v. *Canning*, L. R. 2 C. P. 241; *Dillon* v. *Cunningham*, L. R. 8 Ex. 23.) **380.**

Right of suing on contracts made with married women.

A husband may sue on a contract made with his wife on good consideration. If he die without suing, the right to sue upon it

will survive to the wife. (Sm. Con. 285 ; Ad. Con. 761.) **381.**

Husband's liability for wife's torts.

The husband is liable for all torts committed by the wife during the coverture, unless they are directly connected with contract by her. (Ad. Torts, 730.) **382.**

Custody and correction of the wife.

The custody of the wife's person belongs to the husband. He has no right to chastise her; but he may restrain her liberty, in case of gross misbehaviour. (2 Ste. Com. 273.) **383.**

Payment to the wife.

Payment to a married woman will not bind her husband, unless she had authority from him to receive it. (Chit. Con. 657.) **384.**

SECTION III.

Of Divorce, Annulling Marriage, and Separation.

Divorce before the new Divorce Act.

I. Before the new Divorce Act, there were two kinds of divorce by the Ecclesiastical Court : first, a divorce a vinculo matrimonii, whereby the marriage was declared null, as having been absolutely unlawful ab initio, and the issue, if any, became bastardised, and the parties were enabled to contract another marriage; second, a divorce a mensa et

thoro, whereby they were merely separated, without annulling the marriage. **385.**

Divorce a vinculo matrimonii could not be obtained from the Ecclesiastical Court for any post-nuptial cause, but was often granted on the ground of adultery, by a private Act of Parliament. (2 Ste. Com. 285–7.) **386.**

The new Divorce Act.

By the stat. 20 & 21 Vict. c. 85, the jurisdiction of the Ecclesiastical Courts was transferred to the Court for Divorce and Matrimonial Causes, now included in a Division of the High Court of Justice. **387.**

Judicial separation.

This Court may, on the petition of either husband or wife, decree a judicial separation, in lieu, and having the effect, of the divorce a mensa et thoro. (ss. 7, 16.) Such judicial separation may be decreed on the ground of adultery, or cruelty, or desertion without cause for two years and upwards. The Court may also grant a divorce or dissolution of marriage, on the petition of the husband, upon the ground of the post-nuptial adultery of the wife; or upon the petition of the wife, upon the ground that the husband, since the marriage, has been guilty of incestuous adultery, or bigamy with adultery, or rape, or unnatural crime, or adultery coupled with certain kinds of cruelty, or with desertion,

Divorce under the new Act.

without reasonable excuse, for two years or upwards. (s. 27.) But the Court may not grant a divorce, if the petitioner has been accessory to or connived at the adultery, or has condoned it. (s. 29.) **388.**

And the Court will not be bound to grant a divorce, if the petitioner has, during the marriage, been guilty of adultery, or if the petitioner has been guilty of unreasonable delay in presenting or prosecuting the petition, or of cruelty towards the other party, or of having deserted or wilfully separated from the other party before the adultery complained of and without reasonable excuse, or of such wilful neglect or misconduct as has conduced to the adultery. (s. 31.) **389.**

By the dissolution of marriage the husband loses all those rights which he would otherwise acquire jure mariti after that time. And hence if the divorced wife dies before she has reduced a chose in action into possession, the divorced husband will have no right to it either as her administrator or otherwise. (*Wilkinson* v. *Gibson*, L. R. 4 Eq. 162.) **390.**

By the common law, the wife does not forfeit by adultery any benefit under her marriage settlement or under a deed of separation. But by the stat. 20 & 21 Vict. c. 85,

s. 45, the Divorce Court may deal with her property on her divorce for her adultery. (Ad. Con. 751, 774.) **391.**

Alimony.

An order may be made for alimony to the wife, either on a decree for judicial separation on the wife's petition, or on a decree for dissolution of the marriage. (ss. 17, 32.) Alimony is an allowance made to the wife when cohabitation has ceased. It is either pendente lite or permanent. (Macq. 135, 141.) **392.**

Appeal.

Marriage after a divorce.

In case of no appeal, or in case of an appeal having deen dismissed, or if the marriage is dissolved, either party may marry again. (s. 57. See on this subject, Macq. passim.) **393.**

Annulling marriage.

II. Marriages may be annulled where they have taken place after a divorce obtained by fraud or collusion or from a Court not having competent jurisdiction; or where the parties are within the prohibited degrees of consanguinity or affinity (*a*), or both have acted in wilful disobedience of certain of the enactments as to the marriage ceremony; or where there was, in either of the parties at the time of the marriage, corporal incapacity, idiotcy, or lunacy; or where the marriage was the result of force or fear, not followed

(*a*) See supra, par. 344, 345.

by voluntary cohabitation. (Macq. 323–344.) **394.**

Separation by consent.

III. The husband and wife may agree to live separately; and the Courts of Law and Equity have recognised the validity of deeds or articles of separation, where the husband and wife have actually separated. **395.**

The husband usually covenants with trustees appointed on behalf of the wife, for her maintenance; and the trustees covenant to indemnify the husband against her debts; and each party covenants not to molest the other or sue for the restitution of conjugal rights. But an agreement relating to a separation not actually existing, or a covenant for separation, whether immediate or future, is void. (2 Ste. Com. 284–5; Sm. Law of Prop. 5th ed. par. 3275–3286; Ad. Con. 772–3.) **396.**

As a deed of separation cannot dissolve the marriage, it does not relieve the wife from any of the ordinary disabilities of coverture. (Story's Eq. Jur. § 1428; Chit. Con. 167; Ad. Con. 771, 778.) And reconciliation puts an end to a deed of separation, as it must not be permitted to parties to make agreements for themselves to hold good whenever they choose to live separate. (2 Spence's Eq. Jur. 532; Ad. Con. 773.) **397.**

CHAPTER II.

PARENT AND CHILD.

Who are legitimate children.

A LEGITIMATE child is one between whose parents the relation of marriage subsisted at the time of conception or of birth, or at some intervening period. Whether the husband is the real parent of a child born to his wife during the marriage or after the death of the husband, may, however, be open to controversy. But he is presumed to be the parent, unless he was absent for not less than nine calendar months or forty weeks before the birth, or was impotent, or could not have had sexual intercourse with the wife during that period. (See 2 Ste. Com. 291–2; Steer Par. Law, 568; Co. Litt. 123 b. n. 1, 2.) **398.**

Custody, maintenance, and education of children.

In general, parents are entrusted with the custody and education of their children, on the natural presumption that the children will be properly treated, and that due care will be taken of them, in regard to learning, morals, and religion. But whenever this presumption is negatived by the actual state

of the case, and a father or a mother is guilty of gross ill-treatment of his or her infant child, or is living in gross immorality, or otherwise acts in a manner injurious to the morals or interests of his or her children, the Supreme Court deprives him or her of the custody of his or her children, and appoints a suitable person to act as guardian, if the children have property. (St. § 1341–9; *Swift* v. *Swift*, 34 Beav. 266; 4 D. J. S. 710; *In re Besant*, L. R. 11 Ch. D. (Ap.) 508.) And by the Supreme Court of Judicature Act, 1873, s. 25, clause (10), it is enacted that "in questions relating to the custody and education of infants, the rules of Equity shall prevail." **399.**

Parents may be compelled to provide their legitimate children, of whatever age, with necessaries when the children are in poverty, and unable, through infancy, disease, or accident to support themselves. (2 Ste. Com. 296–7.) But a father is not under any legal obligation to educate his child (except so far as he may be compelled under the stat. 33 & 34 Vict. c. 75, s. 74, or any other statute); and he is not liable to pay a debt contracted by his child, even for necessaries, without his authority. (Chit. Con. 144; Macph. 516.) **400.**

Children's debts.

The father's power over his children.

A father is entitled to the custody and control of his children until the age of twenty-one years; and he may correct them while under age, in a reasonable manner; and may delegate his authority to their tutor or schoolmaster. (2 Ste. Com. 299–301.) **401.**

The mother's power over her children.

The mother has no legal power over her child in the father's lifetime, at least as against the father, unless delivered into her custody by the Supreme Court. But after the father's death, she is entitled to the custody of the child during minority. (2 Ste. Com. 301; Macq. 174.) **402.**

Maintenance of parents.

The children of poor persons not able to support themselves, must, if of sufficient ability, maintain their parents. (2 Ste. Com. 302.) **403.**

Action by parents.

A parent cannot bring an action for injury done to his child, though the parent may have been put to expenses in getting the child cured, unless the child is old enough to render him some sort of service, however slight, and can be treated in law as his servant at the time (!). (Ad. Torts, 697; 3 Ste. Com. 532; Rosc. 589, 590; *Thompson* v. *Ross*, 5 Hurl. & Norm. 16; *Hedges* v. *Tagg*, L. R. 7 Ex. 283.) And it has been held that even then he cannot bring an

action either for loss of service or for the burial expenses, if the injury resulted in the immediate death of the child! (*Osborn* v. *Gillett*, L. R. 8 Ex. 88.) **404.**

Indeed, a parent has no remedy for the seduction of his daughter, even though he may have been put to great expenses in consequence of it, unless the child was living with him, or he had a right to her services, at the time, and by reason of her pregnancy and illness he was deprived of those services to which he had a right. If he had a right to her services, however slight, and without proof of any having been rendered or been likely to be required, an action for damages is maintainable by the parent against the seducer (*a*), where the pregnancy was caused by him, and the parent was not the indirect cause of the seduction, by introducing her to profligate acquaintances or encouraging improper intimacies. (Ad. Torts, 697–700; Broom Com. 75, 77–8; 3 Ste. Com. 532; Rosc. 589, 590; *Terry* v. *Hutchinson*, L. R. 3 Q. B. 599.) **405.**

(*a*) The gross injustice of the cases where relief has been withheld from the parent is only equalled by the absurdity of the ground on which, in other cases, relief has been given to him. But the former has given rise to the latter.

In estimating, however, the damages to be given for a daughter's seduction, the jury may give the father damages for the disgrace, distress, and anxiety of mind which he has sustained. (Ad. Torts, 702; Mayne, 284; Rosc. 590; *Terry* v. *Hutchinson*, L. R. 3 Q. B. 599.) **406.**

Custody and maintenance of illegitimate children.

The mother of an illegitimate child is entitled to its custody, and is bound to maintain it while she remains single or a widow, or until the child attains the age of sixteen, or gains a settlement in its own right, or, being a female, is married; and if the mother marries, her husband then becomes subject to the same obligation; but this ceases on the mother's death. If, however, the mother, while single or a widow, is not of sufficient ability, she can compel the father to supply a fund for its maintenance until it is thirteen, or, if the justices making the order think fit, until the child is sixteen, and she may take steps for that purpose, even before the child is born. (2 Ste. Com. 302–4; Steer Par. Law, 559, 560, 569; 35 & 36 Vict. c. 65, ss. 3, 4, 5; 36 Vict. c. 9, s. 3.) **407.**

CHAPTER III.

GUARDIAN AND WARD.

THERE are several species of guardianship:

Different species of guardianship.

1. Guardianship by nature, which is a guardianship of the person only, belonging to the ancestor, in respect to his heir apparent or heiress presumptive, until the age of twenty-one years. **408.**

1. By nature.

2. Guardianship for nurture, which is a guardianship of the person only, belonging to the father, or, at his decease, to the mother, and extends to all the children, until the age of fourteen years, if not to the age of twenty-one. **409.**

2. For nurture.

3. Guardianship in socage, which extends both to the person and the estate, where the legal estate in hereditaments of socage tenure descends upon a minor. **410.**

3. In socage.

If the land descends to the heir ex parte paterna or ex parte materna, the guardianship of the person belongs to the next of blood to whom the inheritance cannot descend. **411.**

But if the infant derives land by descent both ex parte paterna and ex parte materna, the next of kin on either side first seizing the infant is entitled to the custody of his person. This guardianship continues until the minor is fourteen years of age. **412.**

4. By statute.

4. Guardianship by statute, which is created by an appointment by a father, made by deed or will, of a guardian of the persons and estates of his legitimate children, until the age of twenty-one years, or for any less time. Such an appointment is effectual against all persons claiming as guardians in socage or otherwise. **413.**

A mother cannot appoint a guardian. Nor can a father make a valid appointment of a guardian to his natural child. If, however, he does nominate a person to be guardian, the Supreme Court will generally appoint such person to that office. **414.**

5. By election.

5. Guardianship by election, which is nearly, if not quite, obsolete. **415.**

6. By appointment of the Supreme Court.

6. Guardianship, by appointment of the Supreme Court, of the person and estate of an infant, whether legitimate or illegitimate, who has property, or of the person only of an infant who, by reason of being a party to proceedings in Court, has become a ward of the Court. Such a guardian may

be appointed either where there is no other guardian, or where it appears to the Court to be expedient that a guardian of any kind should be superseded. **416.**

7. Guardianship, ad litem, which occurs where a person (usually the father or ordinary guardian) is appointed by a Court of justice to prosecute or defend for an infant in any suit to which he is a party. **417.** 7. Ad litem.

8. Guardianship by custom, in the case of copyholds and particular cities and boroughs. (2 Ste. Com. 314–323; Macph. 19, 20, 44–8, 53, 59, 60, 76, 80, 81, 103, 105, 109, 110.) **418.** 8. By custom.

Every guardian, when the ward comes of age, is bound and compellable to account to him, and must answer for all losses by his wilful default or negligence. The guardian will be allowed his reasonable costs and expenses, but may not make any profit out of his ward's estate. (2 Ste. Com. 323; Macph. 348, 350.) **419.** Obligation to account. Liability. Allowances.

Full age, in male or female, is twenty-one years; and it is completed on the morning of the day preceding the anniversy of a person's birth; so that a person born on the 1st of January, 1860, at any moment before midnight, would be of age on the 31st of December, 1880, immediately after midnight Full age.

of the 30th. (2 Ste. Com. 308; Macph. 447.)

420.

Who are infants.

All who are not of full age are legally designated as infants. **421.**

TITLE II.

RELATIONS OF LIFE IN RESPECT OF PROPERTY.

CHAPTER I.

NEIGHBOURING PROPRIETORS (*a*).

THERE are certain rights which the owner of one neighbouring tenement has with respect to another such tenement. **422.**

Rights of neighbouring proprietors.

Those which are directly profitable are called profits à prendre; such as rights of common. **423.**

Profits a prendre.

Those which are mere rights of accommodation are termed easements. An easement may be defined to be a right and privilege, without profit, which the owner of one neighbouring tenement has with respect to another tenement, and by reason of which, for the advantage of the owner of the tenement whereto such privilege is annexed, the

Easements.

(*a*) See supra, par. 270-5.

owner of such other tenement is obliged to suffer, or refrain from doing, something on his own land. There are a great number of easements: such as rights of way, rights to receive air, light, and water. (Gale, 5, et seq.; Ad. Torts, 16, 17; Burton, § 1165.)

424.

Dominant and servient tenements.

The property to which the privilege is annexed as a benefit is termed the dominant tenement; and the property on which the burden or servitude is imposed is called the servient tenement. (Ad. Torts, 17; Gale, 13.)

425.

General principle.

"When one person, in managing his own affairs, causes, however innocently, damage to another, it is obviously only just that he should be the party to suffer. He is bound sic uti suo ut non lædat alienum." (*Rylands* v. *Fletcher*, L. R. 3 H. L. 330, 341; *Hurdman* v. *N. E. Ry. Co.*, L. R. 3 C. P. D. (Ap). 168; *Firth* v. *The Bowling Iron Co.*, L. R. 3 C. P. D. 254; *Crowhurst* v. *Burial Board of Amersham*, L. R. 4 Ex. D. 5; and see infra, par. 450.) **426.**

Rights of riparian proprietors.

Where there are distinct proprietors of the lands on opposite banks of a stream, each riparian proprietor is primâ facie the proprietor of the half of the land covered by the stream which is nearest his own bank,

and has the right of fishing over that half, but has no property in the water. Every landowner, however, has a right, as an ordinary incident of property, to use the water of a natural stream flowing through or by his land, for any reasonable purpose not inconsistent with a similar right in the proprietors of the land above and below; as, for instance, to drink, to water his cattle, to turn his mill, &c. But he cannot seriously diminish the quanity, nor deteriorate the quality, nor alter the flow of the water, to the injury of another proprietor, otherwise than by such diminution, retardation, or acceleration, as may be the necessary result of a reasonable use: unless he has gained a title to an easement, by grant or prescription, so to use the water. (Ad. Torts, 1–4, 6, 77–8; Broom Com. 764–5; Gale, 191–7, 238–9; Tudor Real Prop. Ca. 118, 119; Dixon, 124–9, 132; Rosc. 547, 610; *West Cumberland Iron & Steel Co.* v. *Kenyon*, L. R. 6 Ch. D. 773; 11 Ch. D. (Ap.) 782.) And if a stream loses itself in marshy or swampy ground, and the proprietor cuts a course for the water towards its natural destination, whether open or inclosed in a tunnel, he acquires rights analogous to those which he would have if that course had been

a natural stream. And a grantee of the adjoining land or the land to which it is carried by such course will have the same rights. (*Holker* v. *Poritt*, L. R. 8 Ex. 107; 10 Ex. (Ex. Ch.) 59.) On this subject see *Stockport Waterworks Co.* v. *Potter*, 3 Hurl. & Colt. 300.) **427.**

Well water.

A person may sink a well in his own land, and get as much water as he pleases, for any purpose whatever, although he thereby drains the neighbouring springs and wells dry; and the adjoining proprietor has no other remedy than to sink deeper wells, and use appliances to get back the water. (Ad. Torts, 5; Broom Com. 76–7; Gale, 242–262; Dixon, 129; Rosc. 549.) **428.**

Servitude of receiving and discharging water.

If the owner or occupier of the lower lands obstructs the natural flow of the water through his lands, so as to cause the higher lands to be flooded, or if the owner or occupier of the higher lands causes the surface and drain water to flow on the lands below in a greater volume and in an unnatural form, he will be responsible in damages. (Ad. Torts, 6.) **429.**

Passage for waste water.

A person may, by deed or prescription, have a right of passage for waste water through an artificial drain or watercourse in another man's land, without having any

interest in such land. (Ad. Torts, 23; Gale, 54.) **430.**

Stat. 2 & 3 Will. IV. c. 71, s. 31.

By the stat. 2 & 3 Will. IV. c. 71, s. 31, when the access and use of light to and for any dwelling-house, workshop, or other building shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible. **430a.**

Light and air.

"Wherever for the statutory period a given space over the servient tenement has been used by the dominant tenement for the purpose of light passing through that space, a right arises to have that space left for so long as the light passing through it is used for or by the dominant tenement." "And the opening in the dominant tenement," whether it be a window or aperture of any other kind, "is the limit which defines the boundaries of the space over the servient tenement." (Fry, J., in *National Provincial Plate Glass, &c., Co.* v. *Prudential Assurance Co.*, L. R. 6 Ch. D. 757, 765.) **430b.**

On the sale of a house, without the adjoining land of the vendor, a free passage for necessary light and air across such adjoining land is impliedly granted. (Ad. Torts, 37; Gale, 97, 103.) But it has been held that when the owner of a house sells a piece of

adjoining land, without reserving any rights, the purchaser may use it for any purpose to which land may be applied; and there is no implied grant, by the purchaser, of the easement of light necessary for the enjoyment of the vendor's house. The V.-C. Kindersley remarked: "It must be admitted that this law, if carried to an extreme, would in some cases produce great and startling injustice." (*White* v. *Bass*, 7 Hurl. & Norm. 722; *Curriers' Co.* v. *Corbett*, 2 Dr. & Sm. 355; 4 D. J. S. 764; *Ellis* v. *Manchester Carriage Co.*, L. R. 2 C. P. D. 13.) **431.**

Right to build in one person, and right to light and air in another.

Every landowner has a perfect right to build on his own ground, though he thereby obscures his neighbour's light and air, unless his neighbour has acquired a right against him that his light and air shall not be obstructed. This easement of right to uninterrupted light and air may be acquired, like other easements, by grant, express or implied, or by prescription (Goddard on Easements, p. 137; see also Id. p. 25), or by covenant. **431a.**

We have seen that the right to the natural flow of light and air is subject to the right which every one has of building on his own ground. (See Goddard on Easements, p. 25, 137). But this right to build should surely

be deemed to be subject to the qualification of the established maxim, rightly understood, "Sic utere tuo ut alienum non lædas"—a maxim strongly and fully enforced by the House of Lords. (See *Rylands* v. *Fletcher*, L. R. 3 H. L. 330–342, and see par. 450, 1284.) **431b.**

It should be qualified to such an extent, at any rate, as to prevent the person building from inflicting a grievous nuisance on his neighbour; and Lord Coleridge, C.J., decided accordingly, in *Bryant* v. *Lefever*, L. R. 6 C. P. D. (Ap.) 172. But the Lords Justices Bramwell, Brett, and Cotton held that the owner of an adjoining house is not liable in damages, though he by altering his house has "materially interfered with the comfort of human existence" in his neighbour's house, in the way of causing it to smoke, which it did not for more than twenty years before. Certainly this decision, and the reasoning in intended support of it, in the last paragraph of the judgment of Bramwell and Brett, L.J., adopted by Cotton, L.J., p. 181, appear to the author to be extraordinary. **431c.**

Where the owner of an estate grants a lease of a plot of land to a lessee, and that lessee covenants not to erect any building without the lessor's approval, and afterwards

the lessor grants a lease of an adjoining plot to another lessee; and subsequently the first lessee erects a building, with the lessor's approval, so as to darken the windows of the second lessee; it was held on appeal (but, as the writer conceives, improperly), that the lessor could not be restrained from derogating from his own grant to the second lessee, by giving his (the lessor's) approval to the building. (*Master* v. *Hansard*, L. R. 4 Ch. D. (Ap.) 718.) **432.**

Although a person grant a licence to open a window, unless the grant is made by deed, he may build a wall on his own land close to the window, and thereby exclude the light and air from it. (Ad. Torts, 24; Gale, 23.) **432a.**

Neither a landlord nor a tenant can, without each other's consent, obstruct or darken windows existing at the time of the demise. (Ad. Torts, 38; Gale, 100; Rosc. 536.) **433.**

The right to light and air is confined to windows existing at the time of the conveyance, grant, or demise, and does not extend to windows subsequently opened where there were none before, or to new windows of a different size or position from the old ones, except as far as regards the

space of the new windows which may have been occupied by the ancient apertures. (Ad. Torts, 38, 48, 55; Broom Com. 760; Rosc. 528. See, on this subject, *Jones* v. *Taplin*, 11 C B. (N. S.) 283; 12 C. B. (N. S.) 826; *Binckes* v. *Pash*, 11 C. B. (N. S.) 324; *Frewen* v. *Phillips*, 11 C. B. (N. S.) 449; 12 C. B. (N. S.) 826.) But the owner may make alterations merely in the framing and glazing of the window, so as to admit more light and air. (*Turner* v. *Spooner*, 1 Drew. & Sm. 467.) **434.**

If a new house is erected contiguous to another's ground, the latter may, at any time within twenty years, erect any kind of building on purpose to blind the lights of that house; and no action will lie, even though it were done from mere malice. (Broom Com. 74; Gale, 282; Tudor Real Prop. Ca. 123.) **435.**

But the right to the use of light becomes absolute after an absolute enjoyment of it for twenty years next before some suit or action, in which the claim has been brought into question, without an interruption acquiesced in for a year after notice of such interruption. And the custom to rebuild to any height upon ancient foundations in the City of London is destroyed by the Prescription Act.

(2 & 3 Will. IV. c. 71, ss. 3, 4; *Cooper* v. *Hubbock*, 12 C. B. (N. S.) 456.) **436.**

The right to ancient lights now depends on the statute 2 & 3 Will. IV. c. 71, which makes the right indefeasible after twenty years' uninterrupted enjoyment; and therefore it does not require any grant, prescription, or fiction of a licence; and it cannot be lost by a temporary intermission, not amounting to abandonment, nor be forfeited by enlarging the ancient lights or making new lights. (*Tapling* v. *Jones*, 11 H. L. Cas. 290.) **437.**

In considering whether there has been an invasion of light, and what is the measure of the damages, the question is this, Is there a diminution of light for any purpose for which the dominant tenement may be reasonably considered available? The owner of the dominant tenement has the right to the admission of a certain quantity of light by means of apertures through which the light has for a certain period been accustomed to pass, without reference to the precise purpose to which he from time to time has chosen to turn it. (*Moore* v. *Hall*, L. R. 3 Q. B. D. 178.) **437a.**

Rights on grant of part of tenement.

By the grant of part of a tenement, other part of which is not aliened at the same time, there will pass to the grantee all those

continuous and apparent easements over the other part of the tenement which are necessary to the enjoyment of the part granted, and have been hitherto used therewith. But, under ordinary circumstances, there is no corresponding implication in favour of the grantor in respect of the other part retained. Both of these rules are founded on the maxim that a grantor shall not derogate from his own grant. (*Wheeldon* v. *Burrows*, L. R. 12 Ch. D. (Ap.) 31, 49.) **438.**

Invasion of privacy, or obstruction of prospect.

Invasion of privacy, by opening a window which overlooks another man's grounds, is not an act of which the law will take cognisance as a wrongful act (*a*). So that a man may make new windows wherever or whenever he pleases on his own premises. But, on the other hand, his neighbour may erect any building he pleases on his own land, however close, so as to obstruct the light from such windows, if he does so before the former has uninterruptedly enjoyed that light for twenty years; unless the person erecting such building thereby obstructs an ancient light. He may not obstruct any ancient light, though it would be impossible for him to obstruct the new windows

(*a*) As to this, and as to the shutting out a prospect, see supra, par. 275.

without obstructing the ancient light. If, therefore, he cannot obstruct the new windows without obstructing the ancient light, he must put up with the new windows, though they may completely destroy his privacy. (*Tapling* v. *Jones*, 11 H. L. Cas. 290.) **439.**

Rights of owner of surface and subsoil.

In the absence of special stipulations to the contrary, the owner of the surface and the owner of the subsoil must not exercise their respective rights in such a way as to be inconsistent with the fair use and enjoyment of the rights of each other. The owner of the surface, therefore, is entitled to the support of the adjacent strata, sufficient to maintain the surface in its natural state, but not to such a degree of support as is necessary for buildings, unless he has acquired the right of support for them by grant or prescription. If, however, the owner of the subsoil excavates without leaving proper support, the owner of the surface has no right of action until some actual damage has been sustained by him ; but he would have a right to an injunction in Equity to prevent such improper excavation. And the owner of the surface would be entitled to sue in præsenti not only for existing damages, but also for future damages which a referee had found

would arise to an ascertained amount. (*Lamb* v. *Walker*, L. R. 3 Q. B. D. 389; but see remarks of Cockburn, C.J., contra, who dissented from Mellor and Manisty, JJ.; Ad. Torts, 8, 9; Broom Com. 73, 79–81; Gale, 309–312; Rosc. 527; *Backhouse* v. *Bonomi*, 9 H. L. Cas. 503; *Elliot* v. *North Eastern Ry.*, 10 H. L. Cas. 333; *Smith* v. *Thackerah*, L. R. 1 C. P. 564.) **440.**

Primâ facie, the owner of the surface is entitled not only to that, but also to all below it, ex jure naturæ; and those who claim the property in the minerals below, or any interest in them, must show that they are entitled by some grant or conveyance by the owner of the surface. The rights of the grantee of the minerals depend upon the terms of such grant or conveyance. It must be presumed that the minerals must be enjoyed; and therefore that a power to get them must also be granted or reserved, as a necessary incident. Primâ facie, on the other hand, it must be presumed that the owner or lessee of mines is not to injure the owner of the surface, by getting them, if injury can be avoided, or that he is not to be injured further than necessary. But these mutual rights are generally ascertained and settled by the deed by which the right to the mines

is acquired; and so far as such deed is unequivocally expressed, it has the effect of negativing or controlling all presumptions inconsistent with its terms. In the case of mining leases, sometimes the intention is that the lessee shall not affect the surface, by causing any subsidence thereof; in other cases that he should even have the power of disturbing the surface, without any compensation; in other cases, that if he should so disturb the surface, he should compensate the owner of the surface. This intention, of whichever kind it may be, should, of course, be most clearly expressed. Primâ facie, a grant of all the minerals under certain lands (without more) must be read, not as meaning a grant of all the minerals that can be found under those lands, but of all the minerals that can be taken away from under those lands without causing a subsidence of the surface. And even where to that grant is superadded a provision for compensation for damage done to the surface, there, if the words of compensation can be fairly satisfied by reference to acts done on the surface, though they may be large enough to extend to damage done to the surface by taking away the support, still they must be read as if confined to acts done on the surface; the

presumption being that the grantor did not intend to enable the grantee of the minerals to take away the support from the surface. (*Smith* v. *Darby*, L. R. 7 Q. B. 716; *Eadon* v. *Jeffcock*, L. R. 7 Ex. 379.) **441.**

Support of land and buildings by adjacent land or adjoining buildings.

Everyone has a right to such a degree of lateral support to his own land from the land adjoining it, as will be sufficient to sustain his own land in its natural state, without being weighted with buildings. (Ad. Torts, 7; Gale, 309–311, 314, 323; Tudor Real Prop. Ca. 124; *Stroyan* v. *Knowles*, 6 Hurl. & Norm. 454; *Corporation of Birmingham* v. *Allen*, L. R. 6 Ch. D. (Ap.) 284.) And where houses built together require mutual support, the right to such support continues, notwithstanding alterations in the ownership of the houses, by sale, mortgage, devise, &c. (Ad. Torts, 35; Tudor Real Prop. Ca. 126; Rosc. 527.) And it would seem that a person may not take away from the owner of a house or building the benefit of lateral support from the adjoining land or building, after having acquiesced in the enjoyment of that benefit for more than twenty years. (Ad. Torts, 45; Gale, 325–332; Tudor Real Prop. Ca. 125; *Bower* v. *Peate*, L. R. 1 Q. B. D. 321. See supra, par. 302; and see *Angus* v. *Dalton*, L. R. 3 Q. B. D. 85; 4 Q. B. D. (Ap.) 162.) **442.**

Lateral support to sewers.

There is no right of lateral support to a sewer, without grant of an easement or prescription, even though the sewer were constructed under the powers of an Act of Parliament. (*Metrop. Board of Works* v. *Metrop. Ry. Co.*, L. R. 4 C. P. (Ex. Ch.) 192.) **443.**

Support of water under adjoining land.

One who by draining his own land, withdraws from an adjoining owner claiming under the same grantor the support by water theretofore beneath the land of that owner, and thereby causes the surface of that land to subside, is not liable for the injury inflicted, unless the act of draining is absolutely in derogation of the special purpose for which the land was originally granted to the adjoining owner. (*Popplewell* v. *Hodkinson*, L. R. 4 Ex. (Ex. Ch.) 248.) **444.**

Support of upper stories.

There is a right of continuous support of the upper stories of a house from the lower, where they are vested in different owners. (Ad. Torts, 35–6; Gale, 98, 322.) **445.**

Waste land on the side of a river or highway.

In the absence of evidence to the contrary, waste land on the side of a river or public highway is deemed to belong to the owner of the adjoining inclosed land, and not to the lord of the manor, unless the waste land communicates with open commons or larger portions of land. (Ad. Tort, 153; Woolr.

Ways, 5, 6; Sm. Law of Prop. 5th ed. par. 301; Rosc. 610.) **446.**

Ownership of the soil of a lane.

And in the absence of evidence to the contrary, the soil of a lane situate between two closes, and leading only to another close, belongs, in moieties, to the owners of the opposite closes. (*Smith* v. *Howden*, 14 C. B. (N. S.) 398.) **447.**

Trees.

The ownership of a tree standing in a hedge follows the ownership of the hedge. Where all the roots of a tree are in a person's land, though the branches hang chiefly or entirely over another person's land, it belongs to the person in whose land the roots are. But where the trunk stands on one person's land and the roots are in another person's land, it belongs to the person on whose land the trunk stands. (Ad. Torts, 154; Dixon, 81–2; Rosc. 611.) **448.**

Walls.

The property in a wall is presumed to be in him who is bound to repair it, or, in the absence of evidence of such liability, in the owner of the land on which it is built. (Rosc. 611.) **449.**

Liability of owner of mischievous things.

"The person who, for his own purposes, brings on his land, and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril; and if he does not, he is primâ facie answerable for all

the damage which is the natural consequence of its escape. This is established to be the law, whether the things so brought be beasts, or water, or filth, or stenches." (*Fletcher* v. *Rylands*, L. R. 1 Ex. (Ex. Ch.) 265; affirmed, *Rylands* v. *Fletcher*, L. R. 3 H. L. 330, 340–341 (*a*); and see supra, par. 270–2, 274.) **450.**

Fences, hedges and ditches, and trespass of animals.

Every one is bound to take care that his cattle do not trespass on his neighbour's land. (*Ellis* v. *The Loftus Iron Co.*, L. R. 10 C. P. 10.) And he is liable for any trespass thereon, whether he has been guilty of negligence or not (*Ellis* v. *The Loftus Iron Co.*, L. R. 10 C. P. 10, 12–14), unless there is a fence between his land and his neighbour's land, and that fence belongs to his neighbour, and is not kept in good repair by his neighbour; for, in that case, though the owner of the cattle is chargeable with a wrong in suffering his cattle to trespass, yet his neighbour has no remedy, because of his own contributory negligence. **451.**

Where there is no fence, each party must keep his animals on his own land.

(*a*) Mellor, J., justly remarks, "No doubt that case, affirmed as it was in the House of Lords, is of the highest authority, and concludes every case which comes within the principle of it." (L. R. 7 Q. B. 269, 270.) But see *Nichols* v. *Marsland*, L. R. 10 Ex. 255; 2 Ex. D. (Ap.) 1.

If he does not, he is liable for any damages. **452.**

Where there is a fence, it is for the owner of the fence alone to keep it up, and the other party need not repair it, and need not make an additional fence for his own protection, against the animals of the owner of the fence, or for the protection of the owner of the fence. And if the cattle of either stray into the land of the other, the one injured has a right of action against the other, unless the fence belongs to the person injured, and he has failed to keep it in good repair; in which case he is precluded from suing, by his own contributory negligence. **453.**

To state the law in other words, with the view of making the matter the more plain, in the different cases that arise,—where there is a fence, the owner of the animals trespassing is liable, unless the trespass is to be attributed to the bad state of the fence of the injured party. So that a person will be entitled to damages for a trespass, unless it arose from his own fence being not sufficient to keep out ordinary cattle; in which case of course he cannot sue for an injury which was the result of his own negligence in not repairing his own fence. Hence (1) where the fence belongs to the

injurer, he is of course liable, if the fence is bad; because the damage was occasioned by his neglect. And he is also liable, even if the fence is good, on the principle that ordinarily everyone is bound to keep in his own cattle; and that where one of two innocent persons must suffer, it is only right that he should suffer who has occasioned the loss, though unwilfully, unless it was inevitable. (2) If the fence belongs to the party injured, and it is good, of course he is entitled to damages; because he has been injured by his neighbour's cattle, without any neglect or fault on his own part. But if the fence is bad, he is not entitled to sue; because the trespass would or might have been avoided, but for his own fault in not keeping a good fence. **454.**

Where one horse injures another by biting or kicking it through a wire fence belonging to the owner of the horse which did the injury, the owner of the horse which did the injury is liable, whether he was guilty of negligence or not. (*Ellis* v. *The Loftus Iron Co.*, L. R. 10 C. P. 10, 12, 13, 14; and see supra, par. 330.) **455.**

In some cases there is a kind of easement by which a person is bound by prescription or contract to keep up his fence, not only to prevent his own animals from straying, but

also to keep out his neighbour's, not for his own protection, but for the protection of his neighbour. And such obligation may be presumed from a long adverse enjoyment or from other considerations; though not from the mere fact or habit of his repairing, without compulsion, which he might do for his own benefit, without any legal obligation. So that if he does not keep up the fence (whether he has notice to repair it or not, and whether he has knowledge of its want of repair or not), and animals belonging to the occupier of the adjoining land, or animals rightfully put there, get into his land, in consequence of the defective state of the fence, and come to any misfortune thereby (as by falling into a ditch, or eating poisonous food, or the accidental falling of a stack), he is liable. And the remedy is against the occupier as distinguished from the owner; and the occupier may be sued for the loss, even though the defect in the fence was occasioned by the act of a third party (*e.g.* a timber merchant claiming under him). But, in general, a person is not bound to fence out his neighbour's animals for his neighbour's protection, but only to fence out his neighbour's animals for his own protection, and to keep in his own. (Ad. Torts, 4th ed. 125,

154–5, 266–7; Davis on County Courts, 4th ed. 832–3; Gale, 4th ed. 460–1; *Lawrence* v. *Jenkins*, L. R. 8 Q. B. 274.) **456.**

The statute 8 Vict. c. 20, s. 68, enacts, that "a railway company shall make and maintain, for the accommodation of the owners and occupiers of lands adjoining the railway, ... sufficient fences for separating the land taken for the use of the railway from the adjoining lands not taken; and protecting such lands from trespass, or the cattle of the owners or the occupiers thereof from straying thereout by reason of the railway." The word cattle here includes pigs. (*Child* v. *Hearn*, L. R. 9 Ex. 176, 182.) The word "straying" includes putting their heads over or through posts and rails, and injuring vegetables inside the rails; and four feet high is not sufficient against horses. (*Wiseman* v. *Booker*, L. R. 3 C. P. D. 184.) And this enactment is "for the benefit of all persons who are lawfully using adjoining land," so as to include a person who hired a stable of the occupier of adjoining land, whose horse escaped from it in the night, got on the line, and was killed. (*Dawson* v. *Midland Ry. Co.*, L. R. 8 Ex. 8.) But it has been held that it does not extend to cattle which are trespassing on the

adjoining lands, and are neither cattle of the owner or occupier of such lands, nor cattle put there by his licence; or to cattle straying on a road adjoining the railway, and not there under the charge of persons as temporary occupiers of the road. (Ad. Torts, 4th ed. 181.) **457.**

If a tenant of a railway company or a person claiming under him is injured by the cattle on land adjoining the ground let, for want of a sufficient fence, he cannot be in a better position than the railway company; and the occupier of the adjoining land is not liable to him; but the railway company are the persons on whom the Act has cast the liability. (*Wiseman* v. *Booker*, L. R. 3 C. P. D. 184.) **457a.**

As ordinary fences which are sufficient to keep out other animals will not keep out pigs, it would seem right that the obligation should rest on the owner of pigs to keep them from doing any damage, unless the fence of the person injured is not sufficient to keep out even other animals, or unless the fence consists of rails, and they are so wide apart that the pigs can crawl through without difficulty. (See *Child* v. *Hearn*, L. R. 9 Ex. 176.) **458.**

In general a boundary hedge belongs to

the owner who has been in the habit of cutting and repairing it. But, in some cases, the owners of the adjoining lands are tenants in common of the hedge; and in such cases each has a right to clip the hedge, but not to destroy it. (Ad. Torts, 156; Dixon, 96.) **459.**

A person may make a ditch, and widen it as much as he pleases, so far as he can do so by cutting into his own land. No man making or widening a ditch may cut into his neighbour's soil, but he may and usually does cut to the very extremity of his own land; and he is bound to throw the soil which he excavates on his own land, and he often plants a hedge on the top of the soil so thrown up. And hence, where adjacent lands of two distinct proprietors are divided by a hedge and a ditch, the legal presumption is that both the hedge and the ditch belong to the owner of the field in which the ditch is not situate. (Ad. Torts, 155; Dixon, 92; Rosc. 11th ed. 561.) **460.**

Express grant of an easement.

In general, at Law, an easement can only be granted, in a binding and irrevocable manner, by a deed. (Gale, 23; Dixon, 55.) **461.**

Presumption of a grant.

A grant of a right will not be presumed from long continued uninterrupted enjoyment, unless the enjoyment has been open

and notorious, and exercised as a matter of right, and is not capable of being satisfactorily accounted for without presuming a grant. (Ad. Torts, 27.) **462.**

Implied grant of an easement.

If, by the act of the owner, one part of his land becomes dependent upon another for water, light, or air, these easements pass to the grantees of the land to which they are annexed, together with the land. And when a person buys one of two or more adjoining houses belonging to the same owner, the purchaser becomes entitled to the benefit, as an easement, of all the drains from it, and is subject, as a servitude, to all the drains necessary for the adjoining house. (Ad. Torts, 29; Gale, 81, 85.) **463.**

Repairs incident to easements.

A grantee of a right of way or of an artificial drain or watercourse through the grantor's land, or of the use of a pump in the grantor's land, is bound to repair the way, drain, watercourse, or pump, if he desires to have it kept in order for his own use, or if repairs are necessary to prevent it becoming an annoyance to the owner of the servient tenement. And for that purpose he may enter upon the grantor's land, unless the grantor himself has undertaken to repair it. (Ad. Torts, 30, 31, 61, 75; Gale, 424, 441; Tudor Real Prop. Ca. 127.) **464.**

Transfer of rights.

A right which is accessorial to the enjoyment of a house or land passes to the successive assigns of the house or land, by a grant of the house or land. (Ad. Torts, 26; Gale, 75.) **465.**

Cesser of easements.

An easement ceases when the purpose for which it was granted can no longer be accomplished, or when the thing to which it was accessorial ceases, or when the ownership of the dominant and servient tenements becomes vested in the same person, and he has an equal estate in fee simple in both tenements, or when the right is expressly released or abandoned. (Ad. Torts, 53, 57, 59; Gale, 470, et seq.) **466.**

CHAPTER II.

LANDLORDS AND TENANTS (*a*).

How this relation is created.

THE relation of landlord and tenant is created in various ways. It frequently arises by construction of law; as in the case of a tenancy from year to year, so long as both parties please, which is created by implication of law, where a tenement is held for an indefinite period, at a rent payable yearly, half-yearly, or quarterly. But the most regular way of creating the relation of landlord and tenant is by a lease or agreement in writing for a certain term. **467.**

Nature of the relation where created by lease or agreement.

Where the relation is created by lease or agreement for the purpose, the landlord or owner of real property thereby parts with the possession of it to another person, who is called the tenant, and the tenant thereby agrees to render to the landlord a rent, that

(*a*) Many of the points pertaining to the relation between landlord and tenant belong to the subject of Conveyancing Law, as to which the reader is referred to the author's Law of Property, 5th ed.

As to Lodging-house Keepers and Lodgers, see infra, Part III., Title III., Cap. III.

is, a certain thing, usually a sum of money, periodically, as a compensation or recompense for the possession of the property to be held by the tenant. **468.**

Remedy for non-payment of rent.

If the tenant makes default in payment of the rent, the landlord has a remedy for the recovery of it by action or by distress. **469.**

Right of distress.

Landlords who have the immediate reversion of premises in respect of which rent is due to them, may enter upon the premises, in person, or by deputy, and seize and sell the chattels therein, to raise money for the payment of the rent in arrear. (Ad. Torts, 345; Woodf. 355; Tudor Real Prop. Ca. 188, 191.) But until a sale, the ownership of the chattels remains unchanged; and the landlord has no right to sell them to himself. (*King* v. *England*, 4 Best & Sm. 782.) **470.**

When rent is due.

The rent does not become due till the last minute of the day on which it is payable;

When a distress may be made.

and a distress can only be made in the daytime; that is, between sunrise and sunset; and hence, practically, a distress cannot be made until the day after it is payable. (Woodf. 376; Tudor Real Prop. Ca. 190–1; Ad. Torts, 352.) **471.**

A distress may be made even after the

determination of the lease, if within six months, and during the continuance of the landlord's interest and the tenant's possession. (Ad. Torts, 349; Woodf. 386; Tudor Real Prop. Ca. 191; 8 Anne, c. 14, ss. 6, 7.) **472.**

How made.

A gate or outer door or window may not be forced or broken open; nor may an unfastened window be opened, to make a distress; nor can a distress be made upon land not included in the demise, and in respect of which the rent is not payable, except upon land to which the goods have been fraudulently removed, and except in the case of cattle depasturing upon a common appendant or appurtenant. (Ad. Torts, 352–3; Woodf. 369, 378; Tudor Real Prop. Ca. 190; *Hancock* v. *Austin*, 14 C. B. (N. S.) 634; *Nash* v. *Lucas*, L. R. 2 Q. B. 590.) **473.**

Seizure of goods.

In order to make a distress, seizure is necessary; but to constitute a seizure, in contemplation of law, it is sufficient to enter upon the demised premises, and announce to the tenant or his servants, or the persons in actual occupation of the premises, an intention to distrain. (Ad. Torts, 361; Sm. Landl. & Ten. 166; *Cramer* v. *Mott*, L. R. 5 Q. B. 357.) **474.**

Inventory and notice.

After seizure, the person distraining ought

to make an inventory of the goods distrained, and serve it, with a written notice of the amount of rent due, and of the things distrained on the tenant personally, or leave it on the premises; which will amount to an impounding of the distress, without the necessity of actually securing it. (Sm. Landl. & Ten. 166–175; Tudor Real Prop. Ca. 192–3; Ad. Torts, 365, 369.) **475.**

Impounding.

Sale of distress.

After the expiration of five days from a distress being made, and notice thereof and of the cause thereof being left on the premises, the distrainer may cause the chattels to be appraised by two sworn appraisers, and then sold, and the overplus, if any, may be left with the officer for the owner; unless the tenant replevy, or tender the rent and costs within the five days, even after the chattels have been impounded, or, in the case of growing crops, before the corn is ripe. (Ad. Torts, 367, 369; Sm. Landl. & Ten. 178; Woodf. 389–391; 2 Will. & M. c. 5, ss. 1, 2; *Johnson* v. *Upham*, 2 Ell. & Ell. 250.) **476.**

The sale must be for the best price that can be obtained. If of hay or straw, it must not be made subject to a condition that the purchaser shall consume the hay or straw on the premises; though the lease contains a condition that the tenant shall so consume

the same. (Redman & Lyon's Landl. & Ten. 160; *Hawkins* v. *Walrond*, L. R. 1 C. P. D. 280.) **477.**

What may be taken.

As a general rule, all the goods and chattels on the demised premises, whether they belong to the tenant himself or to strangers who have placed them in the custody or possession of the tenant, are distrainable. But tenant's fixtures, in certain cases, are not distrainable; nor are beasts broken to harness, and regularly employed in work connected with the ordinary cultivation of the land, nor sheep or implements of a person's business or profession, so long as there are other distrainable chattels immediately available. Nor is wearing apparel actually on the person of the owner, or money; nor are quickly perishable articles; nor is the property of strangers standing on the demised premises, in the actual or constructive possession of such strangers; nor is property of strangers placed on the demised premises for the purposes of the trade there carried on; such as cloth sent to a tailor, a horse to a farrier, or corn to a mill. This privilege is for the benefit of trade. (Ad. Torts, 353–8; Woodf. 366–376; Tudor Real Prop. Ca. 188–190; 51 Hen. III. stat. 4; *Swire* v. *Leach*, 18 C. B. (N. S.) 479; *Cramer* v. *Mott*, L. R.

5 Q. B. 357, 360; *Miles* v. *Furber*, L. R. 8 Q. B. 77; *Lyons* v. *Elliott*, L. R. 1 Q. B. D. 210.) The privilege from distress of goods delivered to an auctioneer for sale does not extend to goods sold on the premises of the owner of the goods; nor to things of a third person placed on the demised premises to be sold with the goods of the owner of those premises. (*Lyons* v. *Elliott*, L. R. 1 Q. B. D. 210.) **478.**

Stat. 34 & 35 Vict. c. 79, as to lodgers' goods.

By the stat. 34 & 35 Vict. c. 79 (passed 16th August, 1871), intituled, "An Act to protect the Goods of Lodgers against Distresses for Rent due to the Superior Landlord," after reciting that "lodgers are subjected to great loss and injustice by the exercise of the power possessed by the superior landlord to levy a distress on the furniture, goods, and chattels for arrears of rent due to such superior landlord by his immediate lessee or tenant," it is enacted as follows:—

"If any superior landlord shall levy or authorize to be levied a distress on any furniture, goods, or chattels of any lodger for arrears of rent due to such superior landlord by his immediate tenant, such lodger may serve such superior landlord, or the bailiff or other person employed by him to levy such

distress, with a declaration in writing made by such lodger, setting forth that such immediate tenant has no right of property or beneficial interest in the furniture, goods, or chattels so distrained or threatened to be distrained upon, and that such furniture, goods, or chattels are the property or in the lawful possession of such lodger; and also setting forth whether any and what rent is due and for what period from such lodger to his immediate landlord; and such lodger may pay to the superior landlord, or to the bailiff or other person employed by him as aforesaid, the rent, if any, so due as last aforesaid, or so much thereof as shall be sufficient to discharge the claim of such superior landlord. And to such declaration shall be annexed a correct inventory, subscribed by the lodger, of the furniture, goods, and chattels referred to in the declaration; and if any lodger shall make or subscribe such declaration and inventory, knowing the same or either of them to be untrue in any material particular, he shall be deemed guilty of a misdemeanour" (s. 1). **479.**

"If any superior landlord, or any bailiff or other person employed by him, shall, after being served with the before-mentioned declaration and inventory, and after the lodger

shall have paid or tendered to such superior landlord, bailiff, or other person the rent, if any, which by the last preceding section such lodger is authorized to pay, shall levy or proceed with a distress on the furniture, goods, or chattels of the lodger, such superior landlord, bailiff, or other person shall be deemed guilty of an illegal distress, and the lodger may apply to a justice of the peace for an order for the restoration to him of such goods; and such application shall be heard before a stipendiary magistrate, or before two justices in places where there is no stipendiary magistrate; and such magistrate or justices shall inquire into the truth of such declaration and inventory, and shall make such order for the recovery of the goods or otherwise as to him or them may seem just: and the superior landlord shall also be liable to an action at law at the suit of the lodger; in which action the truth of the declaration and inventory may likewise be inquired into" (s. 2). **480.**

"Any payment made by any lodger pursuant to the first section of this Act shall be deemed a valid payment on account of any rent due from him to his immediate landlord" (s. 3). **481.**

Where the hiring com-

A person may be "a lodger" within the

Act though the premises hired by him comprise almost all the house. (*Phillips* v. *Henson*, L. R. 3 C. P. D. 26.) **481a.**

prises almost all the house.

If the landlord distrains in an unauthorized way, he becomes a trespasser from the beginning: all his acts are trespasses; he is a trespasser not only in entering, but in seizing and disposing of the things taken; and the ordinary rule of the common law is, that the tenant shall recover their full value, without deducting the rent in respect of which the distress was made. (*Attack* v. *Bramwell*, 3 Best & Sm. 520, 527.) **482.**

Consequence of distraining in an unauthorised way.

Goods fraudulently or clandestinely removed after rent is due, in order to avoid distress, may, if a sufficient amount of other distrainable property is not left on the premises, be distrained within thirty days, if they have not been sold bonâ fide and for valuable consideration to a person ignorant of the wrongful act. And a penalty to the amount of double the value of the things removed may be recovered. (Ad. Torts, 360, 361; Woodf. 382–4; Tudor Real Prop. Ca. 190; 11 Geo. II. c. 19, ss. 1, 2.) **483.**

Goods fraudulently removed.

If a distress is manifestly beyond what is reasonably necessary for the purpose of realising the rent and expenses, the landlord is liable to an action for damages. (Ad. Torts,

Excessive distress.

363; Woodf. 400; Rosc. 587; *Chandler* v. *Doulton*, 3 Hurl. & Colt. 553.) **484.**

Tender of rent before execution of distress (*a*).

After a warrant of distress is delivered to the broker, but before it is executed, a tender of rent, even without expenses, is a good tender, so as to render the distress illegal. (*Bennett* v. *Bays*, 5 Hurl. & Norm. 391.) **485.**

Power of re-entry for non-payment of rent.

A power of re-entry is sometimes given for non-payment of rent. And where it is agreed "that if the tenant shall make default in payment of the rent, or any part thereof, within twenty-one days after the same shall become due, being demanded, the landlord may re-enter, without giving any notice to quit, and without any other proceeding," "it has been held that a demand within the twenty-one days, and the subsequent lapse of the twenty-one days, will not entitle the landlord to re-enter; for that a demand must be made after the lapse of the twenty-one days." (*Phillips* v. *Bridge*, L. R. 9 C. P. 48.) **486.**

Fixtures and tenant's erections.

In the widest sense, fixtures are things fixed to houses or lands; no erection or other object, however ponderous, is a fixture, if merely placed upon the freehold. (See Amos

(*a*) For some further remarks on distress, see infra, Part IV., Tit. I.

& Ferard on Fixtures, 1, 2; Chit. Con. 325–6.) **487.**

As a general rule, as between the heir and the personal representative of a deceased tenant of the fee, and as between the executors of the owner of a particular estate and the person in remainder, and as between a landlord and tenant, the fixtures will belong, with the freehold to which they are annexed, to the heir in the first case, and to the person in remainder in the second case, and to the landlord in the third case; except such of them as are put up merely for ornament, domestic use, or purposes of trade, and are capable of removal without material damage to the inheritance; which, in the first case, devolve to the personal representative, if not essential to the enjoyment of the inheritance, and, in the second and third cases, if put up by the owner of the particular estate or the tenant, may be removed by him. (2 Ste. Com. 229–231.) **488.**

Where a tenant erects at his own expense, with the landlord's consent in writing, any buildings or machinery for agricultural or trade purposes, he may remove them, if he puts the land or building into as good a condition as it was in before the erection was made, unless the landlord, on receipt of a

month's notice of the intention to remove the erection, elect to purchase the same at a value to be ascertained by two referees or an umpire. (2 Ste. Com. 231; 14 & 15 Vict. c. 25, s. 3.) **489.**

The tenant's rights to remove fixtures may be controlled or modified by express stipulation or by local usage. (2 Ste. Com. 232; Chit. Con. 329.) **490.**

If a tenant who is possessed of fixtures which he has a right to remove, does not remove them during the term, they become a gift in law to the landlord, unless the tenant, after the expiration of the term, is permitted by the landlord to remain in possession, and removes them during his lawful possession. (Ad. Torts. 127; Woodf. 482; Chit. Con. 328; Ad. Con. 373.) **491.**

Right to crops.

The right to away-going crops (*i.e.*, crops not at maturity, sown during the last year of the tenancy), and allowances for tillage, manure, &c., as between the outgoing tenant and the incoming tenant or the landlord, depend on the custom of the particular locality, in the absence of express stipulation. (Ad. Con. 379; Chit. Con. 336–340. On this subject, see *Bradburn* v. *Foley*, L. R. 3 Q. B. D. 129. The reasonableness or unreasonableness of a custom is a question of

law for the Court (Id. 135). As to emblements, see Sm. Law of Prop. 5th ed.) **492.**

Liability for fire.

If premises are destroyed by fire, without any gross negligence on the part of the tenant, and the tenant has not covenanted to repair, the landlord is without a remedy; though if fire is caused by gross negligence, the person guilty of such negligence will be liable. (Ad. Torts, 128, 130; Sm. Landl. & Ten. 199; Woodf. 435; Coote Landl. & Ten. 246–8.) Where a tenant has covenanted to repair (unless he excepted cases of fire), he or his assignee is bound to rebuild, if the premises are burnt down. And in each case he must pay the rent, though he may have lost the enjoyment of the premises. (Woodf. 344, 439, 440; Sm. Landl. & Ten. 202; Ad. Con. 339.) **493.**

Obligation to rebuild and pay rent in case of fire.

Liability to rates and taxes.

Unless there is an agreement to the contrary, the occupier is the party liable to pay poor rates, highway rates, county and borough rates. House tax, paving, watching, lighting, and cleansing rates also generally fall on the occupier. And he is also liable to the water rates, unless the annual value of the dwelling-house does not exceed £10; in which case it falls on the owner. The occupier has to pay the land and property taxes in the first instance; but he may de-

duct them out of his rent, as landlord's taxes, unless, in the case of land tax, the occupier has agreed to pay it. (Woodf. 411–413, 430, 431; Chit. Con. 311, 312.) And in the absence of an agreement to the contrary, a sewers rate for extraordinary repairs or improvements falls upon the landlord, but a rate for ordinary annual repairs falls on the tenant. In the former case, the tenant pays in the first instance, and deducts the rate from his next rent. (Woodf. 10th ed. 466.) **494.**

Tithe rent-charge.

A tithe rent-charge is a charge on the land and not on the person of the owner or occupier; and if the occupier pays it he may deduct it from his rent, unless he has agreed to take it upon himself. (Sm. Landl. & Ten. 100.) **495.**

Duty of tenant as to use of the property.

A tenant of a house is bound to use it in a tenant-like manner, and a tenant of a farm to occupy it fairly and in a husband-like manner, and cultivate it according to the usage of the country where the land is situate. (Woodf. 434, 448; Chit. Con. 311; Ad. Con. 342, 344.) **496.**

Two kinds of repairs.

Repairs are of two kinds; substantial repairs and ordinary repairs. The former include repairs to the main walls, roofs, timbers, &c.; the latter, the common repa-

rations to windows, shutters, doors, &c. (Woodf. 432.) **497.**

Liability to repair.

The landlord is never liable to repairs, unless he has contracted to do them. (Woodf. 10th ed. 488–9, 493–4; Chit. Con. 310.) And even if he has contracted to do repairs, whether substantial or ordinary, he is not liable to an action for non-repair, unless he has received notice of the want of repair. (Woodf. 10th ed. 488–9; *Makin* v. *Watkinson*, L. R. 6 Ex. 25.) **498.**

The extent of the liability of a lessee under a covenant or agreement to repair depends upon the age of the buildings and their condition at the time of the demise, and on the length of the lease. It is the duty of a tenant who is under such a covenant or agreement, to keep the premises in as good a state as they were in at the period of the demise, by a timely expenditure of care and money. And if the buildings are then old and in bad repair, he must put them into good repair; but he is only bound to put them into good repair as old buildings, and not to renew them. (Ad. Con. 338–9, 342–3; Woodf. 462–3; Rosc. 26, 494.) **499.**

In the absence of an express agreement to repair, a lessee for years (unless prevented by fire or other inevitable accident) is bound to

deliver up the premises at the end of the term in the same state as they were in at the time of the demise, subject only to the deterioration produced by ordinary wear and tear and the reasonable use of them for the purpose for which they were let, without such wilful and unreasonable neglect as would cause serious damage which might have been avoided by a little timely care and trifling expense, as in cleansing drains or sewers, or replacing a tile, &c. (Ad. Con. 6th ed. 321–5; Chit. Con. 8th ed. 312, 313; Woodf. 10th ed. 493.) **500.**

Furnished houses or lodgings.

There is an implied condition that a furnished house or lodging shall be in good and tenantable condition, and reasonably fit for occupation from the very day on which the tenancy is to begin; and that where the same is in such a condition that there is either great discomfort or danger to health in dwelling in it then, the intending tenant is entitled to repudiate the contract altogether. (*Wilson* v. *Finch Hatton*, L. R. 2 Ex. D. 336.) **501.**

Bugs.

If furnished houses or apartments are infested with bugs, the tenant or lodger may leave without paying rent. (Ad. Con. 375–6.) **502.**

Fences.

It is the duty of the occupier of lands to

repair the fences. (Woodf. 456; Dixon, 93.) **503.**

Trees, bushes, and hedges.

The property in timber, and in trees which are timber according to the custom of the country, is in the owner of the inheritance. The property in bushes, where they have been cut by a stranger, is in the tenant. And he may clip the hedges, but he may not grub them up or destroy them. Such trees as are not timber at all, nor fruit trees, he may cut down; unless they afford a shelter to the house, or he is restrained by agreement. (Woodf. 458, 460; Dixon, 80, 82–6, 97; Rosc. 611.) **504.**

Notice to quit.

In the absence of agreement or enactment to the contrary, six calendar months' notice, or, where the tenancy commences and ends at any of the usual feasts, a notice for the full period intervening between two half-yearly feasts, is necessary to determine a yearly tenancy; and such notice must expire at the close of the current year, so that the tenant may leave on the anniversary of his entry. Where the tenancy is for a shorter period, a shorter notice is sufficient, but it must expire at the close of that period. In the case of a monthly letting, a month's notice is required. In the case of lodgings, a long notice is not necessary; a reasonable notice is sufficient.

(Ad. Con. 356; Rosc. 674; Chit. Con. 313, 319, 320; *Morgan* v. *Davies*, L. R. 3 C. P. D. 260.) **505.**

The Agricultural Holdings Act, 1875 (38 & 39 Vict. c. 92, s. 51), provides that "where a half year's notice, expiring with a year of tenancy, is by law necessary and sufficient for determination of a tenancy from year to year, a year's notice so expiring shall by virtue of this Act be necessary and sufficient for the same; but nothing in this section shall extend to a case where the tenant is adjudged bankrupt, or has filed a petition for a composition or arrangement with his creditors." By section 56, "this Act shall apply to every contract of tenancy beginning after the commencement of this Act, unless" the parties agree that the Act shall not apply. **505a.**

Where the premises have been underlet, the sub-tenancy must be determined by a notice from the lessor to the lessee, or from the lessee to the sub-lessee. Notice from the lessor to the sub-lessee is inoperative. (Rosc. 676.) **506.**

The notice must mention a specific time for quitting. It may be oral, unless otherwise agreed. If a written notice is given, it may be given to a member of the family or a servant, at the dwelling-house; or it may

be sent by post. In the former case, if the person to whom it was given knew the purport thereof, it is valid, though it be not actually received by the tenant. In the latter, it will be presumed to have been received by post; but if the contrary is proved, the notice will not be valid. (*Tanham* v. *Nicholson*, L. R. 5 H. L. 561; Woodf. 10th ed. 307, 316; Rosc. 12th ed. 904, 907; Chit. Con. 318, 322; Ad. Con. 354, 361.) **507.**

A notice to quit may be waived, either expressly, or by certain acts of the landlord inconsistent with the cessation of the tenancy. (Chit. Con. 324; Ad. Con. 362.) **508.**

Where a lease is to expire on a particular event or at a particular time, no notice to quit is necessary. (Ad. Con. 353, 357.) **509.**

Holding over.

If the tenant holds over after the expiration of the term, and there has been a payment and acceptance of subsequent rent, the law, in the absence of evidence to the contrary, implies that he continues to hold on such of the terms of the previous demise as are applicable to a tenant from year to year. (Ad. Con. 362–3; Woodf. 523; Rosc. 669.) **510.**

A tenant wilfully retaining possession after the determination of his term, and after pos-

session has been demanded and notice in writing has been given him by the lessor, and in the absence of a bonâ fide belief that he has a right to do so, is liable to pay, for the time he holds over, double the yearly value of the premises. (Ad. Con. 363; Rosc. 508; 4 Geo. II. c. 28, s. 1; *Swinfen* v. *Bacon*, 6 Hurl. & Norm. 184, 846.) **511.**

And if a tenant gives notice to the lessor of his intention to quit at a particular time, and does not deliver up possession at that time, he may be compelled to pay double the rent which would otherwise have been payable. (Ad. Con. 364; Rosc. 510; 11 Geo. II. c. 19, s. 18.) **512.**

Ejectment by landlord.

Where the landlord claims the land from his tenant, it is not necessary for the landlord to prove his title to it; for it is a rule that a tenant or any one claiming under him shall not be allowed to dispute his landlord's title, that is, the original right of the person who admitted him into possession: but he may show that it has since expired, or been determined or parted with. (Broom Com. 738–740; Rosc. 667; Chit. Con. 303–4, 306; 2 Selw. 696–7; *London & N. W. Ry. Co.* v. *West*, L. R. 2 C. P. 553.) **513.**

Ejectment by a stranger.

A tenant to whom a writ in ejectment is delivered, or to whose knowledge it comes,

must, under penalty of forfeiting the value of three years' improved or rack rent, forthwith give notice thereof to his landlord, that he may be allowed to appear and defend. (Cole Eject. 115; Broom Com. 742; C. L. Pro. Act, 1852, s. 209.) **514.**

Recovery where half a year's rent is in arrear.

Where half a year's rent is in arrear, and no sufficient distress is left on the premises, there, without a formal demand or re-entry, the landlord may entitle himself to recovery, by serving a writ in ejectment, or if it cannot be served, or there is no tenant in possession, by affixing a copy thereof on the door of the house or upon some notorious place of the lands. But if the tenant, before trial, pays the rent and costs into Court, he may hold on. (Ad. Con. 367; Rosc. 681; C. L. Pro. Act, 1852, s. 210, 212.) **515.**

Action for use and occupation.

Where hereditaments have been held or occupied by a person by permission of the landlord or owner, and yet not by virtue of any demise under seal, the landlord or owner may have an action against him for the use and occupation of the hereditaments, though there may have been no beneficial enjoyment. And any demise or agreement otherwise than by deed may be used as evidence of the quantum of damages to be recovered. (Chit. Con. 340–343; Ad. Con. 334-8.) **516.**

CHAPTER III.

VENDORS AND PURCHASERS.

A MAN may dispose of his goods by sale to any person, and in any manner he pleases.

Power of disposal.

And he may so dispose of them, even where a writ of execution has been delivered to the sheriff, but the sale will be subject to the rights of the execution creditor, unless made in market overt, that is, in open market, or for valuable consideration, and before seizure, to a bonâ fide purchaser, having no notice of the writ.

Sale after execution.

Sale by a person who has not the property in the goods,

And even where a person is not the owner of goods, but has only the possession, as in the case of a thief or a finder, he may make a valid sale, if between sunrise and sunset, in market overt, to a bonâ fide purchaser who does not know that they are not his property.

in market overt,

In the country, market overt is only held on certain days and in a certain place. In the City of London, every day, except Sunday, is market day, and every shop is market overt, for the sale by the shopkeeper of things to the public which are publicly exposed there for sale,

and in which the shopkeeper professes to trade, though not perhaps for the sale of such things to the shopkeeper. But a sale by sample is not within the rules applicable to sales by market overt. (Sm. Merc. Law, 484–6; Tudor Ca. on M. L. 603–6; Selw. 1335; 2 Ste. Com. 71–2; Ad. Con. 7th ed. 434–7; Chit. Con. 353, 378; 19 & 20 Vict. c. 97, s. 1; *Crane* v. *The London Dock Co.*, 5 Best & Sm. 313.) **517.**

A purchaser of goods or chattels in market overt acquires no title to them, if he buys them with knowledge of the vendor's want of title; as when he knows that the vendor is not the owner, or is an infant, or is a married woman who does not usually deal in them, and is not acting by the consent of her husband. And if they were stolen, or obtained from the owner by false and fraudulent pretences, and the offender is convicted, they revest in the owner on conviction, and the owner may then recover them from any person, even a purchaser for valuable consideration, without notice, who has them in his hands or under his control at the time they are demanded by the owner. But persons who buy them bonâ fide in market overt, and sell them again before the conviction, even with notice that they were stolen,

cannot be sued for the value of them. (Ad. Torts, 198; Sm. Merc. Law, 486; Tudor Ca. on M. L. 605–7; 2 Ste. Com. 72–3; Ad. Con. 7th ed. 434–7; Chit. Con. 353, 371; 21 Hen. VIII. c. 11; 7 & 8 Geo. IV. c. 29, s. 57; *Cundy* v. *Lindsay*, L. R. 3 Ap. Cas. 459. See and consider *Moyce* v. *Newington*, L. R. 4 Q. B. D. 32.) **518.**

or elsewhere.

As a general rule, a person who buys goods otherwise than in market overt acquires no better title than that possessed by his immediate vendor, even though such purchaser buys bonâ fide, without notice of any infirmity of title on the part of his vendor. And therefore, if they were sold by a person who found them, the owner may recover them from the person who so bought them; and if they were stolen, the owner may recover them from such purchaser, although the thief has not been convicted. (Ad. Torts, 190; Tudor Ca. on M. L. 603, 608; Chit. Con. 352; Ad. Con. 7th ed. 434–7; *Cundy* v. *Lindsay*, L. R. 3 Ap. Cas. 459, 464.) **519.**

Purchase of a stolen horse.

A purchaser gains no property in a horse which has been stolen, unless it is bought in a fair or market overt, after having been exposed there for an hour between ten in the morning and sunset, and the price, colour, and marks of it, and the names, additions,

and abode of the vendor and purchaser, have been taken down by the book-keeper. And even then it may be reclaimed within six months, on tendering to the person in possession the price paid by him in market overt. (2 Ste. Com. 74; Ad. Con. 165; Oliph. 3rd ed. 59, 60.) **520.**

Subject to the preceding remarks, a fraudulent sale is not void, but only voidable; the property passes, and vests until the sale is avoided. (Chit. Con. 352, 371.) **521.**

Verbal contract.

According to the common law, goods might always be sold by a mere verbal agreement, either to be completed in præsenti, coupled with payment or tender of the price, or payment of a part of it, or a delivery or tender of the goods, or delivery of part of them, or to be completed in futuro, by a future payment of the price, or a future delivery of the goods, or by both. (Sm. Merc. Law, 488, 492; 2 Bl. Com. 447; 2 Ste. Com. 68; Rosc. 354.) **522.**

Written contract.

By stat. 29 Car. II. c. 3, s. 4, no action shall be maintained on any agreement for the sale of goods, that is not to be performed within a year from the making thereof, unless the agreement be in writing, signed by the party to be charged therewith or some

other person thereunto by him lawfully authorized. **523.**

By s. 17 of the same Act, no contract for the sale of goods for the price of 10*l.* and upwards shall be good, unless the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain or in part payment, or some note or memorandum in writing of the bargain be made and signed by the parties to be charged by such contract or their agents lawfully authorized. And this is extended by Lord Tenterden's Act, 9 Geo. IV. c. 14, s. 7, to all contracts for the sale of goods of the value of 10*l.* and upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, produced, or provided, or fit or ready for delivery. And it applies even to goods sold by auction or in market overt. (Sm. Con. 110–113; Broom Com. 402, 403; 2 Ste. Com. 69, 70; Sm. Merc. Law, 494–6; Ad. Con. 52, 171; Rosc. 355; Chit. Con. 354–5; *Cusack* v. *Robinson,* 1 Best & Sm. 299.) **524.**

Several documents may together constitute the contract, if they refer to each other in such a manner as to show they are parts of

the same contract. (Sm. Con. 113; Chit. Con. 356; Ad. Con. 59, 167; *Buxton* v. *Rust*, L. R. 7 Ex. 1; Id. (Ex. Ch.) 279; Archibald, J., in *Peirce* v. *Corf*, L. R. 9 Q. B. 218.) **525.**

A mere offer in writing made by one party, and not assented to by the other, is not a sufficient compliance with the requisitions of the statute. (Sm. Merc. Law, 503; 2 Chitty's Statutes, 158; Chit. Con. 356.) **526.**

There is no acceptance within the statute until the purchaser has had an opportunity of judging of the articles. (Ad. Con. 172.) **527.**

The note or memorandum should disclose the names of the parties or their agents, and the thing sold, and the price, if agreed; but it need not state minutiæ. (Ad. Con. 167; Chit. Con. 356; Sm. Merc. Law, 504.) **528.**

Signature by the defendant, whether he be the vendor or vendee, is sufficient. Signature by the plaintiff is not necessary. (Chit. Con. 358.) **529.**

Delivery and acceptance.

Actual delivery and acceptance are not necessary: constructive or virtual delivery, such as handing the key of a box, and constructive or virtual acceptance, such as an alienation of the property by the buyer, will suffice. (Rosc. 358–9, 375; Chit. Con. 363; Ad. Con. 173, 200.) **530.**

Auctioneer or broker the agent of both parties.

An auctioneer is usually the agent of both parties after the acceptance of the bid, and until the deposit is paid, and, as such, he may sign the contract, so as to bind both parties, and receive the deposit. (Broom Com. 414–416; Ad. Con. 6th ed. 67; Chit. Con. 9th ed. 368; Rosc. Evid. 12th ed. 297, 465.) **531.**

The auctioneer's clerk has no authority to sign a contract of sale by the general custom; but there may be special circumstances to show that the clerk had such authority. Thus, where the bidder, as the person to be charged, authorizes by word or sign the clerk to sign on his behalf, he makes the clerk his agent for signing, though by the general custom the clerk would not be the bidder's agent, but only the agent of his employer, the auctioneer. (Blackburn, J., in *Peirce* v. *Corf*, L. R. 9 Q. B. 210, 215; Rosc. Evid. 12th ed. 297.) **532.**

It is a sufficient memorandum in writing of a contract within the Statute of Frauds to bind the purchaser, if the auctioneer writes down the purchaser's name in a ledger, sale book, or catalogue, provided it contains or sufficiently refers to the conditions of sale, as circulated, and the property sold. (*Peirce* v. *Corf*, L. R. 9 Q. B. 210; Chit.

Con. 9th ed. 368.) But though authorized to receive the deposit, the auctioneer has no general authority to receive the purchase-money of real estate. (Sm. Merc. Law, 506; Broom Com. 414–416; Rosc. 12th ed. 297, 465; Chit. Con. 9th ed. 368–9; Ad. Con. 6th ed. 67.) A broker is the agent of both parties, and he usually binds them by making and signing an entry of the contract in his book; and he transmits to them copies of this entry, which are called bought and sold notes; the bought note being transmitted to the buyer, and the sold note to the seller. (Sm. Merc. Law, 507; Broom Com. 417, 418; Ad. Con. 169; Rosc. 362; Chit. Con. 68, 359; *Thompson* v. *Gardiner*, L. R. 1 C. P. D. 777.) **533.**

Sale of goods belonging to a third person.

An auctioneer is not bound to pay over the proceeds of sale to the person who employed him, when he has received notice from a third person, and the fact is, that the goods did not belong to the person who employed him, but to such third person. (*Biddle* v. *Bond*, 6 Best & Sm. 225.) **534.**

Actions by auctioneers.

In respect of his lien for his commission, auction duty, &c., an auctioneer can sue the purchaser for the price of goods sold. (Ad. Con. 6th ed. 621.) And the purchaser can-

Set-off.

not ordinarily plead any set-off in respect of

a debt owing from the vendor to him. (See Ad. Con. 6th ed. 68, 967.) For that would tend unduly to expose the auctioneer to risk; and it would enable the creditor to pay himself in an unfair and indirect manner, at the expense of others, and sometimes to sweep away everything for his own benefit, in liquidation of his own debt, and thus defeat the object of a sale which might be for the benefit of the creditors generally; and it would greatly tend to prejudice sales by auction. **535.**

But if a vendor has agreed with his creditor that the creditor may bid at the auction, and may take the things purchased in satisfaction of his debt, without payment, the auctioneer is bound by this agreement, though it be unknown to him; and he cannot recover the price from the purchaser, if, at least, the auctioneer's charges have been satisfied before action, and if he has not paid over the price to the vendor, or if he has paid over the price to the vendor, but after notice of the agreement between the vendor and the purchaser. (*Grice* v. *Kenrick*, L. R. 5 Q. B. 340.) **536.**

Action against vendor or auctioneer for loss by withdrawal of goods.

If goods are bonâ fide advertised for sale, and withdrawn without notice, it has been held that the owner or the auctioneer cannot be sued by any one who has spent money and time in attending the sale to no purpose.

(*Harris* v. *Nickerson*, L. R. 8 Q. B. 286.) Yet it amounts to a tort under some circumstances, for which he ought to have some moderate compensation for time, trouble, and expenses. **537.**

Retracting an offer to buy or sell.

An offer to buy or sell may be retracted at any time before it is unconditionally and completely accepted, by words or conduct. And a bidding at an auction is a mere offer, which may be retracted before the hammer is down. (Ad. Con. 15–17; Rosc. 354.) **538.**

Warranties.

Warranties are either express or implied. **539.**

Express.

Every affirmation at the time of the sale of personal chattels is a warranty, if it appears to have been intended as a warranty (and not as a mere expression of opinion on a point as to which the other party is to exercise his judgment), and if the contract and the affirmation are both oral. But even an express warranty, if after a sale, is void, for want of consideration. And an oral allegation previous to or at the time of a sale by written contract, or a private communication previous to a sale by auction, has been held not to operate as a warranty. An affirmation or representation, in order to be a warranty, must be made pending the negotiation ending in the sale, or pending the contract. (Sm.

Merc. Law, 518, 519, 522; Ad. Torts, 638; Broom Com. 347–9; Rosc. 332; Chit. Con. 411, 412, 414; Ad. Con. 231–6; *Percival* v. *Oldacre*, 18 C. B. (N. S.) 398.) **540.**

A warranty does not extend to defects which would at once be apparent to any casual observer, or which are known to the purchaser at the time of the purchase. But a purchaser who relies upon a warranty is not bound to make any particular examination of the articles before he buys. (See Ad. Torts, 637; Morton V. & P. 353–5; Chit. Con. 413; Ad. Con. 235.) **541.**

Implied warranty as to title.

On a sale of goods by a shopkeeper or a person as owner, there is an implied warranty as to title; so that if it turns out that he is not the owner, and the goods are recovered from the buyer by the true owner, the buyer may recover back the price which he has paid for them, as money paid upon a consideration which has failed. (*Eichhole* v. *Bannister*, 17 C. B. (N. S.) 708. But see *Bagueley* v. *Hawley*, L. R. 2 C. P. 625.)

Implied warranty as to quality, description, or purpose for which adapted.

But as a general rule, on a sale of goods, there is no implied warranty as to the quality of them; the rule being, Caveat Emptor. If, however, the vendor has peculiar or exclusive means of information, and he pretends to know the truth, he will be taken to

warrant his knowledge of the fact. Hence every representation as to the qualities of a horse made by the owner to the buyer, pending the negotiation which results in the sale, amounts to a warranty, unless the person making such representation protects himself by negativing a warranty. And so, where a jeweller sells a glittering stone as a diamond, he impliedly warrants it to be a diamond. (Ad. Torts, 639, 641, 643; Sm. Merc. Law, 517; Broom Com. 248–9; Chit. Con. 9th ed. 417–420; Ad. Con. 231–2; and see par. 194–5, 199–203.) And the rule Caveat Emptor does not apply where the buyer has no opportunity of inspection. In such a case there is an implied warranty that the article shall be of the specified description, and of a merchantable quality. (*Jones* v. *Just*, L. R. 3 Q. B. 197; Chit. Con. 10th ed. 413; Ad. Con. 7th ed. 493.) **542.**

A person who undertakes to supply an article of a particular description, or to answer a certain purpose, is deemed to warrant that it is of that description, or will answer that purpose. And this warranty extends even to latent defects which no skill or care could have detected. And where a person agrees to furnish manufactured articles, he is deemed to warrant them to be of

a merchantable quality, except so far as an inspection of the goods or a sample is had, and the defect would be apparent therefrom. (Sm. Merc. Law, 517; Ad. Con. 228–9; Morton V. & P. 347; Rosc. 332; Chit. Con. 408; *Mody* v. *Gregson*, L. R. 4 Ex. (Ex. Ch.) 49; *Randall* v. *Newson*, L. R. 2 Q. B. D. (Ap.) 102.) **543.**

If a person by whom or by whose order an article is made, or by whom an article is sold to a person who has no opportunity of seeing it, represents that it is of some superior or peculiar quality, or that it is fit for a particular purpose, he is deemed to warrant that fact. And if a purchaser gives a shopkeeper reason to believe that he relies on the skill and judgment of the shopkeeper to supply an article fit for a particular purpose, the shopkeeper is deemed to warrant that the article supplied is fit for that purpose. (Ad. Torts, 643–6; 2 Ste. Com. 75; Chit. Con. 409, 410; Ad. Con. 227.) **544.**

If a general dealer in provisions sells unwholesome food, he is liable to an action for deceit, by anyone injured thereby. (Ad. Torts, 651; Ad. Con. 230; Chit. Con. 409.) **545.**

But if a salesman offers for sale a carcase having a latent defect of which he had no means of knowing, he is not liable. (*Em-*

merton v. *Mathews*, 7 Hurl. & Norm. 586.)

546.

Implied warranty as to trade marks.

By the stat. 25 & 26 Vict. c. 18, s. 19, it is enacted, that after the 31st of December, 1863, the sale of any article with a trade-mark shall be deemed to have been made with the warranty or contract, by the vendor with the vendee, that such trade-mark was genuine and true, and not forged or counterfeit, and not wrongfully used, unless the contrary be expressed in some writing signed by or on behalf of the vendor, and delivered to and accepted by the vendee.

547....

Implied warranty as to number, quantity, measure, weight, or place of manufacture or production.

And by s. 20, after the 31st of December, 1863, where any article or articles shall be sold with a description, statement, or indication of or respecting the number, quantity, measure, or weight thereof, or the place or country in which the same shall have been made or produced, such sale shall be deemed to be made with the warranty or contract, by the vendor with the vendee, that no such description, statement, or indication was in any material respect false or untrue, unless the contrary shall be expressed in some writing signed by or on behalf of the vendor, and delivered to and accepted by the vendee.

548.

Non-disclosure of defects.

If a person who offers an article for sale at the ordinary market price is aware of any material latent defect, and does not disclose it, and knows that the purchaser is deceived by its appearance, he is responsible in damages. But if a defect can easily be discovered by the purchaser, and he has the opportunity of discovering it at the time, there, in the absence of special reasons to the contrary, the maxim Caveat Emptor will apply. (Ad. Torts, 651–2; Ad. Con. 227, 228, 242.) And when there is a patent defect in an article, and the means of examination are afforded to the purchaser, whether he avails himself thereof or not, the representations of the vendor as to the goodness of the article, if not made to induce the purchaser to forbear inspection or examination, and if believed to be true by the vendor, do not constitute a fraud in law, though untrue. (Ad. Con. 233; *Horsfall* v. *Thomas*, 1 Hurl. & Colt. 90.) **549.**

Sale by sample.

On a sale by sample, there is an implied warranty that the sample has been fairly taken from the bulk; and also that the bulk is equal in quality to the sample, so far as the seller knows, or is to be deemed to know; and even that the bulk is absolutely equal to the sample, except, perhaps, in certain

cases where there are latent defects in the bulk unknown to the seller, and when both parties had equal means of knowledge; in which it would perhaps be held (properly or improperly) that the maxim Caveat Emptor applied. In the opinion of the writer, upon principle, the seller clearly ought to be liable for latent defects, whether discoverable on inspection of the bulk or not, where those defects could not be discovered from the sample. (See Ad. Torts, 4th ed. 850–852; Morton V. & P. 131–3; Ad. Con. 230; 6th ed. 214; Chit. Con. 9th ed. 421; Benjamin on Sales; *Ormrod* v. *Huth*, 14 Mees. & W. (Ex. Ch.) 651; *Mody* v. *Gregson*, L. R. 4 Ex. (Ex. Ch.) 49.) **550.**

Remedy in case of breach of warranty.

In the case of a breach of a warranty on an executory contract, (as where an article is ordered to be made of a certain quality or fit for a certain purpose,) the purchaser may either refuse to receive it, or may return it, if he has done no more than was necessary to ascertain whether it was of the quality or was fit for the purpose specified. And in like manner a purchaser by a sample may refuse to receive or may return the bulk, if it does not correspond with the sample. But he is not bound to return it or put it in neutral custody; it is enough if he gives

notice that he rejects it. (See references next par.) **551.**

Where there has been an absolute sale of a horse or other specific article in esse, with a warranty, and not a mere sale conditional on its answering to the warranty, and there is a breach of the warranty, the purchaser is not entitled to return it, and sue for recovery back of the whole price, if paid, unless the vendor was guilty of actual fraud. But his only remedy is an action for recovery of damages, or a giving evidence of the breach of the warranty in reduction of the price, if unpaid and sought to be recovered. And in other cases where the vendor of a warranted article sues for the price or value, the purchaser may prove the breach, if any, of the warranty in reduction of damages. (Chit. Con. 8th ed. 424–5; Ad. Con. 6th ed. 222–3; Rosc. 11th ed. 257; *Grimoldby* v. *Wells*, L. R. 10 C. P. 391. See supra, par. 203.) **552.**

In case of a breach of warranty of an article which had been paid for, the purchaser may recover the whole price, if he is entitled to return, and does return, the article, or if the vendor consents to take it back. If the purchaser keeps it, he may recover the difference between the value and the price,

or he may sell it for what he can get, and recover the residue of the price. (Chit. Con. 417; Rosc. 334; Ad. Con. 6th ed. 222–3, 1077.) **553.**

Where a horse does not answer to a warranty, and the purchaser is entitled to return it, and he immediately tenders it back, and the seller refuses to take it, the purchaser need not resell it at once, but may keep it a reasonable time in order to resell it to the best advantage, and may oblige the seller to pay the expenses of its keep, as part of the damages. (Ad. Torts, 668; Oliph. 3rd ed. 167; Chit. Con. 421; Ad. Con. 1060.) **554.**

Where, by a condition of the contract, the purchaser of a horse is to be at liberty to return it by a certain time, if it does not answer its description, he may return it by that time, though in the meantime it meets with an accident, but without his neglect or default. (*Head* v. *Tattersall*, L. R. 7 Ex. 7.) **555.**

Sale "with all faults."

If a statement is made that the purchaser of an animal or chattel "must take it with all faults," and that the vendor "will give no warranty," and will refuse all compensation for faults, as "all lots are open to inspection before the sale," the vendor will be relieved

from all liability in respect of any defect, where the vendor says or does nothing with intent to conceal any defect. (*Ward* v. *Hobbs*, L. R. 4 Ap. Cas. 13.) And this was held by the Court of Appeal and the House of Lords (against the Queen's Bench) even, in a case of animals sent by the vendor into the market, where the jury found he knew that they were infected with contagious disease. This case must be read with the greatest care and caution, lest it be misunderstood. **555a.**

But a sale of an animal or a chattel "with all faults" will not protect the vendor from an action for deceit, if he has been guilty, not merely of concealment, but of wilful deception. (Ad. Torts, 653–4; Ad. Con. 244; Morton V. & P. 130; Rosc. 368; Chit. Con. 413.) **556.**

Transfer of the right of property, right of possession, and actual possession.

In many cases, there may be a binding contract, and yet no transfer of the property or ownership. In others the ownership may be transferred, but the right of possession may remain for a time in the vendor. In others, both the ownership and the right of possession may pass, but the actual possession may be retained. (Ad. Con. 183; Chit. Con. 370, 388, 401.) **557.**

Where the property passes.

If the thing sold is ascertained and completed, and nothing remains to be done on

the part of the seller or the buyer before the delivery, and either nothing is said as to the time of payment, or the goods are sold on credit, or the whole or part of the price is paid, or possession of all or part of the thing sold is accepted by the buyer, there, subject to the provisions of the Statute of Frauds already stated (par. 523, 524), and in the absence of special reasons to the contrary, the property in the goods immediately passes to the buyer, and the right to the price to the seller. And the seller is bound to deliver them, when demanded, upon payment of the price. But if the thing sold remains to be ascertained or completed, or if any act remains to be done on the part of the seller before delivery, there (as a general rule, and in the absence of any intention to the contrary) the property does not pass until that act has been done. Thus, where goods have to be selected, marked, weighed, counted, measured, or tested, in order to identify them, or to determine the price, there, in general, the property will not pass until that is done. And the purchaser of a certain number of things out of a larger aggregate of things of the same kind, acquires no property in any part, until there has been a separation and an appropriation to which both vendor and

vendee have given their express or implied assent, either before or after such appropriation. Nor in the case of an article to be made does the property pass until the article has been approved by the purchaser, in the absence of any intention to the contrary. (Broom Com. 396–7, 400–1; 2 Selw. 1334; Tudor Ca. on M. L. 515–517, 523–8; Rosc. 354, 632–3; Chit. Con. 344–9, 370, 389; Ad. Con. 184–7; *Turley* v. *Bates*, 2 Hurl. & Colt. 200; *Campbell* v. *Mersey Docks*, 14 C. B. (N. S.) 412; *Moakes* v. *Nicolson*, 19 C. B. (N. S.) 290; *Boswell* v. *Kilborn*, 15 Moo. P. C. 309; *Young* v. *Matthews*, L. R. 2 C. P. 127; *Jenner* v. *Smith*, L. R. 4 C. P. 270.) **558.**

The property or ownership may pass, even though the price be not mentioned in the contract, inasmuch as the law will infer an agreement to pay a reasonable price. (*Joyce* v. *Swann*, 17 C. B. (N. S.) 84, 102.) **559.**

If a person agrees to pay a certain sum of money for goods in præsenti, or indefinitely, and the owner agrees to take it, and then they separate, this does not amount to a binding agreement, unless the goods or a part of them were delivered, or the price or some part of it, or an earnest, however trifling, was tendered, or unless the delivery or payment was agreed to be postponed. (Sm.

Merc. Law, 488–490; 2 Ste. Com. 68; 2 Bl. Com. 457; Broom Com. 394–5; Rosc. 354.) **560.**

The property in a chattel which is not yet in existence does not pass by a contract for the sale of it. And a grant of goods not belonging to the grantor at the time will pass no property in them at law, even by relation, after they are acquired. (Sm. Merc. Law, 492–3; Tudor Ca. on M. L. 528; Chit. Con. 348.) **561.**

Risk.

The buyer of goods has the risk, as soon as the property in them has passed to him. (Sm. Merc. Law, 493; 2 Ste. Com. 68; Ad. Con. 183; Rosc. 632; Chit. Con. 345; *Sweeting* v. *Turner*, L. R. 7 Q. B. 310.) **562.**

Delivery on sale or return.

Goods delivered on "sale or return" are deemed to be sold, unless returned within a reasonable time. (Broom Com. 397; Tudor Ca. on M. L. 528; Ad. Con. 239.) **563.**

Right to the price and to the goods.

The vendor is not entitled to the price until he delivers the goods; nor is the purchaser entitled to the goods until he tenders the price; unless in either case it is otherwise agreed. But in a present contract of sale on credit, the right to the possession of the goods passes immediately to the purchaser, unless there is an apparent intention to the contrary. (Selw. 1334; Sm. Merc. Law, 489; 2 Ste. Com. 69; Ad. Torts, 200;

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Tudor Ca. on M. L. 516; Rosc. 632; Ad. Con. 193.) **564.**

If the purchaser of goods becomes insolvent before the contract has been completely performed, the seller, notwithstanding he may have agreed to allow credit for the goods, and may have delivered some of them, is not bound to deliver any more until the price of those delivered, and of those yet to be delivered, is paid. (*Ex parte Chalmers, In re Edwards*, L. R. 8 Ch. Ap. 289.) And indeed if the goods are to be delivered and paid for by instalments, and the buyer fails to pay an instalment under such circumstances as to give the seller reasonable ground for believing that he will be unable to pay, and will not go on with the contract, the seller may repudiate it. (*Bloomer* v. *Bernstein*, L. R. 9 C. P. 588.) **565.**

Vendor's duty to deliver.

After a sale of specific ascertained chattels at a fixed price, it is the vendor's duty to deliver them, upon payment or tender of the price, and performance of all other conditions (if any) on the purchaser's part. **566.**

Delivery to an agent.

Delivery to the purchaser's agent is in general equivalent to a delivery to the purchaser himself. (Broom. Com. 398–9; Tudor Ca. on M. L. 522.) **567.**

Vendor's

If the vendor refuses or neglects to deliver

refusal to deliver.

the chattels, he may be sued, either for damages for breach of his contract, that is, for the difference (if any) between the agreed price and the market value of the goods at the time of the breach, or where there is no market for them, the value; or in trover or detinue. (Ad. Torts, 200; Sm. Merc. Law, 510; Ad. Con. 1058; *Chinery* v. *Viall*, 5 Hurl. & Norm. 288; *Ogle* v. *Earl Vane*, L. R. 2 Q. B. 275; 3 Q. B. (Ex. Ch.) 272; *Hinde* v. *Liddell*, L. R. 10 Q. B. 265. See infra, Part IV. Tit. II. Cap. II. on *Damages*.) **568.**

Purchaser's refusal to accept the goods.

If the purchaser refuses to accept the goods after the vendor has performed all conditions on his part, the vendor may sue him. And if the property has not passed to the purchaser, the vendor may sue him for damages for breach of his contract, *i.e.*, the difference (if any) between the agreed price and the market price, as ascertained by a re-sale (if the vendor has exercised his right of re-sale within a reasonable time), or as computed, together with the expenses he has incurred. But if the property has passed to the purchaser, the vendor may sue him for the price, in an action for goods bargained and sold. (Sm. Merc. Law, 523–4; Rosc. 365–6; Ad. Con. 1057. See infra, Part IV. Tit. II. Cap. II. Sec. II.) **569.**

Wilful misrepresentation by vendor.

If the vendor is guilty of any wilful misrepresentation, which induced the purchaser to enter into the contract, he may refuse to complete it. (Rosc. 368; Chit. Con. 609–614.) **570.**

Sale without stipulation as to price.

Where no price is fixed, the vendor is entitled to receive their fair value, or, in the absence of proof as to their value, the lowest price of goods of that description. (Sm. Merc. Law, 504, 529; Morton V. & P. 70, 71; Ad. Con. 167, 1057.) **571.**

Neglect to pay price.

In case of the neglect of a purchaser to pay for goods delivered, the vendor may recover the price, in an action for goods sold and delivered. (Sm. Merc. Law, 527; Ad. Con. 1057.) **572.**

Effect of provision for avoidance of a contract by one party.

A stipulation or enactment that a sale shall be void on breach of a condition by one party, only renders it void at the election of the opposite party. (Sm. Merc. Law, 509; Ad. Con. 193.) **573.**

Sale of "goodwill."

The mere sale of the goodwill of a business will not prevent the vendor from setting up a similar business, even next door to the purchaser, or soliciting the custom of his former customers. But if he has engaged to abstain from carrying on a similar business, he will then be bound, provided the restriction be within reasonable limits. And he is

not at liberty to set up a precisely similar business under the old style or firm, although his name be the only one which, with the addition of the words "and Co.," constitutes the old style of firm. Nor is he at liberty, in any other manner, to hold out that he is carrying on business in continuation of, or in succession to, the business carried on by the old firm. The mere sale does not oblige him to introduce the purchaser to the customers, or to recommend him to them, or to do any one act for the purpose of giving effect to the sale. But if the vendor has expressly engaged to do any such specific act, he will be compellable to do it, or may be made to pay damages for the breach of his agreement. (Sm. Law of Prop. 5th ed. par. 1688, 1689.)

574.

Contracts and covenants to sell or transfer property do not constitute a legal charge.

At Law, contracts and covenants to sell, convey, or transfer land or other property, are considered simply as personal and executory contracts and covenants, and not as attaching to the property in any manner as a present or future charge or otherwise. (Sm. Law of Prop. 5th ed. par. 1698.)

575.

Sales by improper weights and measures.

Sales made by unauthorized weights or measures, or by weights or measures not stamped, or found light or unjust, are void.

(Ad. Con. 218; Sm. Merc. Law, 535; 5 Geo. IV. c. 74; 6 Geo. IV. c. 12; 5 & 6 Will. IV. c. 63, s. 6; 22 & 23 Vict. c. 56.) **576.**

Sale of coals.

Coals must be sold by weight, and not by measure; and must be weighed, if required by the purchaser; and a ticket in a certain form must be delivered to the purchaser of any coals exceeding 560 pounds, delivered within 25 miles from the General Post Office; otherwise the vendor cannot sue for the price. (Ad. Con. 218; Sm. Merc. Law, 535; Chit. Con. 383.) **577.**

Sale of liquors.

No one may sue for the price of spirituous liquors, unless the debt has been contracted at one time to the amount of 20*s.* or upwards; nor may any item in an account for distilled spirituous liquors be allowed, where liquors delivered at one time and mentioned in such item do not amount to 20*s.* at the least. But this does not apply to liquors delivered at the purchaser's residence in quantities of not less than a reputed quart at one time. (Ad. Con. 219; Chit. Con. 386; 24 Geo. II. c. 40, s. 12; 25 & 26 Vict. c. 38.) **578.**

Sale of certain articles to brewers.

The sale of certain drugs and articles to brewers is prohibited. (Ad. Con. 219.) **579.**

Vendors and purchasers

The subject of vendors and purchasers of

real estate and chattels real is one which is more peculiarly connected with Equity and Conveyancing; and the student is consequently referred to the books on those branches of law for information on that subject. **580.**

CHAPTER IV.

MORTGAGORS AND MORTGAGEES, PLEDGORS AND PLEDGEES, AND PERSONS HAVING A LIEN.

I. *Mortgagors and Mortgagees* (*a*).

PART III. TIT. II. CAP. IV.

Legal mortgage defined.

A LEGAL mortgage is a security, created by means of a transfer, by a debtor to his creditor, of the legal ownership of real or personal estate, subject to be defeated on the discharge of the debt. (Sm. Law of Prop. 5th ed. par. 986–995.) **581.**

Mortgagor and mortgagee's estate and rights.

So long as the mortgagor remains in possession, the mortgagee's estate is not absolute, even at Law. For, by the stat. 15 & 16 Vict. c. 76, ss. 219, 220, if an ejectment be brought by the mortgagee, and no suit be pending in any Court of Equity for redemption or foreclosure, the payment of principal, interest, and costs shall, except in certain cases, be deemed a satisfaction of the mortgage, and

(*a*) On this subject (which is but slightly noticed here, as being more peculiarly connected with Equity and Conveyancing) the student is referred to the author's Law of Property, 5th ed., and the works therein cited.

the Court may compel the mortgagee to re-convey the estate. But when the mortgagor has ceased to be in possession, and there has been a default in payment of the money at the stipulated time, the estate of the mortgagee becomes absolute at Law. Yet his estate is in Equity treated as a mere security for the principal and interest and costs properly incurred in relation to the mortgage, and follows the nature of the debt. And although, where the mortgage is in fee, the legal estate descends to the heir of the mortgagee, yet, in Equity, it is deemed a chattel interest and personal estate, and belongs to the personal representatives as assets. **582.**

The mortgagee is entitled to enter into possession of the lands, and, after notice to the tenants, to recover the rents and profits, unless there is some agreement to the contrary; and if the security is insufficient, he may fell timber, and sell it, and apply the produce towards the liquidation of his debt; but, with this exception, he may not commit waste. He may grant leases, subject to the equity of redemption, and avoid, by ejectment, without notice, any leases that have been made by the mortgagor, without his concurrence, subsequently to his mortgage.

He must, however, account for the rents he receives, and pay an occupation-rent for such part as he may keep in his own possession. **583.**

The mortgagor is not entitled to the possession in respect of his equitable estate, unless there is some special agreement to that effect, but he holds it solely at the will of the mortgagee, who may generally at any time, without giving any prior notice, recover the same by ejectment against him, unless he is ready to pay principal, interest, and costs, or against his tenants under a tenancy created subsequently to the mortgage, and not confirmed by the mortgagee; and he is not even entitled to reap the crop. But so long as he continues in possession by the permission of the mortgagee he is entitled to take the rents and profits in his own right, without rendering any account whatever to the mortgagee, though the mortgaged property may have become an insufficient security. **584.**

Actions for possession of land by mortgagors.

By the Supreme Court of Judicature Act, 1873, s. 25, clause (5), it is enacted that, "a mortgagor entitled for the time being to the possession or receipt of the rents and profits of any land as to which no notice of his intention to take possession or to enter into the receipt of the rents and profits thereof

shall have been given by the mortgagee, may sue for such possession, or for the recovery of such rents or profits, or to prevent or recover damages in respect of any trespass or other wrong relative thereto, in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person." **585.**

Mortgage by memorandum or deposit.

A person may create an equitable, though not a legal, mortgage, by a mere memorandum or a mere deposit of deeds. (Sm. Law of Prop. 5th ed., particularly par. 997, 1068, 1117–1127.) **586.**

II. *Pledgors and Pledgees, generally.*

Definition of a pledge or pawn.

A pledge or pawn is a thing delivered to a person to be kept by him as a security for, and restored on the payment of, a debt, or the performance of an engagement. (Ad. Con. 298.) **587.**

Difference between a pledge and a mortgage.

A pledge of personal chattels differs from a mortgage; for a pledge only passes a special or qualified property or ownership to the pawnee, with a power of sale in case of non-payment at the stipulated time; and the pledgor retains the general property or ownership, and may transfer it both at Law and in Equity; whereas a mortgage passes the general property or ownership to the

mortgagee, though conditionally. (Sm. L. C. 194; Broom Com. 786; Sm. Law of Prop. 5th ed. par. 1128; Ad. Con. 298, 305.) **588.**

Transfer of possession.

Transfer of the possession of the chattel to the pledgee is essential. (Sm. L. C. 196; Ad. Con. 298; *Martin* v. *Reed*, 11 C. B. (N. S.) 730.) **589.**

Use of pledge.

If the pledge would be the worse for use, it may not be used by the pledgee. (Chit. Con. 428; Ad. Con. 309.) **590.**

Rights of pledgor and pledgee generally.

Where a thing is pledged for a certain time, the pledgee cannot demand payment or fulfilment, nor the pledgor the return of the pledge, until the expiration of that time. Where a thing is pledged indefinitely to a person who is not a pawnbroker, the pledgor is entitled to redeem at any time, and the pledgee may compel the pledgor to redeem or be foreclosed, *i.e.*, lose his right of redemption. (Ad. Con. 304.) **591.**

In case of default in payment, the pledgee (not being a pawnbroker), after giving due notice and opportunity to redeem, may sell the pledge, and apply the proceeds in liquidation of the debt: or he may sue the pledgor for the debt, though he retain the pledge; for the pledge is only a collateral security. (Sm. L. C. 194; Chit. Con. 428, 530; Ad.

Con. 306–7; *Pigot* v. *Cubley*, 15 C. B. (N. S.) 701.) **592.**

Stolen property pledged.

If stolen property has been pledged with any person, the owner may sue him, even though he had no knowledge of the theft. (Ad. Torts, 199; Rosc. Evid. 635; Ad. Con. 299.) (*a*.) **593.**

Re-pledging

Where pledgees are induced by the pledgors to give back the goods on the fraudulent representation that they (the pledgors) had sold them, and would hand over to the pledgees the money, the pledgees cannot recover back the goods as against subsequent pledgees from whom the pledgors had obtained an advance bonâ fide. (*Badcock* v. *Lawson*, L. R. 5 Q. B. D. (Ap.) 284.) **593a.**

III. *Persons having a Lien.*

Liens are either legal or equitable. **593b.**

Legal lien.

A legal lien is the right of a person to retain property of which he has the lawful possession, until a debt due to him has been satisfied. (Sm. Merc. Law, 563, 570; Cross on Lien, 2, 30–38.) **594.**

(*a*) For enactments relating to Pawnbrokers and persons dealing with them, see the stat. 35 & 36 Vict. c. 93, for consolidating, with amendments, the Acts relating to pawnbrokers, which took effect Jan. 1, 1873.

PART III. TIT. II. CAP. IV.

Equitable lien.

An equitable lien is a hold upon property for the satisfaction of a claim attaching thereto, under an express charge or contract or a constructive trust. (Sm. Law of Prop. 5th ed. par. 976–982.) **595.**

Two kinds of legal liens.

There are two species of legal liens, namely, particular liens and general liens. **596.**

Particular.

Particular liens are liens upon goods, in respect of money due on them, or of labour, trouble, or care expended upon them; and these liens are favoured in law. So that unpaid vendors of chattels not parted with, and not sold on credit, parties who have advanced money on the security of chattels, common carriers, shipowners, tailors, factors, artisans, and others to whom chattels have been delivered, in order that such persons might bestow labour, trouble, or care upon them, for a pecuniary consideration, have a lien upon them for it. **597.**

General.

General liens are liens in respect of a general balance, due in the ordinary course of dealing in the same business; and these are founded on express agreement or custom only, or the previous course of dealing, which must be proved by the bailee; and they are taken strictly. Warehousemen, wharfingers, innkeepers, factors, packers, in-

surance brokers, bankers, and solicitors have a general lien. (Ad. Torts, 277–8, 282–5; 2 Ste. Com. 81; Sm. Merc. Law, 564–5; Cross on Lien, 14, 15, 20, 23–4; Rosc. 649–653; Chit. Con. 495; Ad. Con. 414, 454; *Allen* v. *Smith*, 12 C. B. (N. S.) 638; *In re Witt, Ex parte Shubrook*, L. R. 2 Ch. D. 489; *Mulliner* v. *Florence*, L. R. 3 Q. B. D. (Ap.) 484.) **598.**

Rules as to the existence, transfer, and cesser of liens.

A lien must not be at variance with the terms or implied understanding upon which the property was received. (Ad. Torts, 279, 282; Rosc. 651.) **599.**

It cannot be transferred. (Ad. Torts, 288.) **600.**

If goods are sold on credit, and no time for delivery is fixed, the vendor has no lien. (Chit. Con. 389.) **601.**

If security, such as a bill, note, or bond, payable at a distant day, is taken for a debt for which the creditor has a lien, or a new agreement is come to for payment of such a debt in a particular manner, the lien is gone. (Ad. Torts, 280; Sm. Merc. Law, 570–571; Chit. Con. 389; Byles, 360.) **602.**

If a bailee voluntarily parts with the possession of property upon which he has a legal lien, the lien ceases. (Ad. Torts, 288; Sm. Merc. Law, 569; Cross on Lien, 38.) **603.**

A lien may be at once extinguished by a tender of the money. (Ad. Torts, 288; Sm. Merc. Law, 570.) **604.**

When a person has merely a lien on goods, he has no right to sell them. (Ad. Torts, 193; Cross on Lien, 47; *Mulliner* v. *Florence*, L. R. 3 Q. B. D. (Ap.) 484.) **605.**

CHAPTER V.

PARTNERS (*a*).

Partnership defined.

PARTNERSHIP is the voluntary association of two or more persons, who contribute money, effects, labour, care, or skill, for the purpose of carrying on, as principals, a common undertaking, for a lawful object, for their common profit. (Sm. Merc. Law, 20; Tudor Ca. on M. L. 303–4, 307; Ad. Con. 635; Lindley, 1; and infra, par. 610–617.) **606.**

Contract of partnership.

The partnership contract need not be in writing, but may be entered into verbally, or inferred from the conduct of the parties. (Sm. Merc. Law, 26; Lindley, 81, 87–9.) **607.**

Articles of partnership.

An agreement in writing for a partnership is designated by the name of articles of partnership. (Sm. Merc. Law, 32; 2 Ste. Com. 98; Lindley, 88.) **608.**

Who may be partners.

Each of the partners must be competent

(*a*) As this Manual relates only to that portion of Common Law which is termed Private Law, it does not include the law of Joint-stock Companies, the statutory part of which has been consolidated by the statute 25 & 26 Vict. c. 89.

to contract; and therefore, if the contract of partnership is attempted to be entered into by an infant, it is void; and if by an alien enemy, it is void; and if by a married woman, it is void, except by special custom, or upon the civil death, transportation, or judicial separation of the husband, or in respect of her separate estate. (Tudor Ca. on M. L. 305–6; Sm. Merc. Law, 23; Lindley, 74, 77, 79; stat. 37 & 38 Vict. c. 62.) **609.**

Criterion and requisites of a partnership.

A community of profits is essential to a partnership. But there may be a participation in the profits without a partnership. And an equality of profit is not necessary to a partnership; nor is it necessary that there should be a community of that which produces the profit, or a community of loss. For one partner may contribute all the money, all the stock, or all the labour; and, by express stipulation, one partner may be exonerated from all loss, as between himself and his companions, though he will nevertheless be liable to strangers. (Sm. Merc. Law, 20–22; Broom Com. 536; 2 Ste. Com. 100–1; Tudor Ca. on M. L. 306, 308; Lindley, 10, 16, 57; Chit. Con. 212, 213, 217; Ad. Con. 639, 664; *Ex parte Tennant*, L. R. 6 Ch. D. (Ap.) 303.) **610.**

Different positions of

A person may be a partner with one only

persons interested in the profits.

of a firm, in respect of his share, without being a partner with the others. And persons may be partners as to third persons, without being partners inter se. And even before a late Act, if a person had a share in the profits, not as a principal, so as to give him a right to an account, but as a mere agent, factor, or servant, he was not a partner as between himself and his employers, but he was a partner as to third persons. But a person might have a virtual interest in the profits, by stipulating that he should receive, as agent, factor, servant, or creditor, or in some other character than that of a principal, a sum proportioned to the gross profits, without being a partner, even as to third persons. So that a person having a virtual interest in the profits, may, in respect of that interest, be a partner, both as regards the other person or persons engaged in the undertaking, or one of them, and as regards strangers; or he may be a partner as regards strangers only; or he may not be a partner in any respect. (See Sm. Merc. Law, 22; Broom Com. 536–7; Tudor Ca. on M. L. 304, 310, 311; Rosc. 378; Chit. Con. 213, 216, 223; Ad. Con. 654; Lindley, 13, 34; *Cox* v. *Hickman*, 8 H. L. Cas. 268; *Bullen* v. *Sharp*, 18 C. B. (N. S.)

614; and L. R. 1 C. P. (Ex. Ch.) 86; *Holme* v. *Hammond*, L. R. 7 Ex. 218.) **611.**

Stat. 28 & 29 Vict. c. 86.

Some alteration has been made by the stat. 28 & 29 Vict. c. 86, passed the 5th of July, 1865. By that Act:—

The advance of money on contract to receive share of profits not to constitute the lender a partner.

1. "The advance of money by way of loan to a person engaged or about to engage in any trade or undertaking, upon a contract in writing with such person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on such trade or undertaking, shall not, of itself, constitute the lender a partner with the person or the persons carrying on such trade or undertaking, or render him responsible as such." **612.**

Although an agreement is expressed to be an agreement for a loan to a partnership under this section, and contains a declaration that the lender shall not be a partner, he will nevertheless be a partner, if the result of the agreement, as a whole, independently of the reference to the Act and the declaration, is to give him the rights and impose on him the obligations of a partner. (*Ex parte Delhasse*, L. R. 7 Ch. D. (Ap.) 511.) The Act only applies to a loan made upon the personal responsibility of the trader or traders

to whom it is made, and not to a loan made on the security of the business. (*Ex parte Delhasse*, L. R. 7 Ch. D. (Ap.) 511.) **612a.**

The remuneration of agents, &c., by share of profits not to make them partners.

2. "No contract for the remuneration of a servant or agent of any person engaged in any trade or undertaking by a share of the profits of such trade or undertaking shall, of itself, render such servant or agent responsible as a partner therein, nor give him the rights of a partner." **613.**

Certain annuitants not to be deemed partners.

3. "No person being the widow or child of the deceased partner of a trader, and receiving by way of annuity a portion of the profits made by such trader in his business, shall, by reason only of such receipt, be deemed to be a partner of or to be subject to any liabilities incurred by such trader." **614.**

Receipt of profits in consideration of sale of goodwill not to make the seller a partner.

4. "No person receiving by way of annuity or otherwise a portion of the profits of any business, in consideration of the sale by him of the goodwill of such business, shall, by reason only of such receipt, be deemed to be a partner of or be subject to the liabilities of the person carrying on such business." **615.**

In case of bankruptcy, &c., lender or vendor of goodwill not to rank with other creditors.

5. "In the event of any such trader as aforesaid being adjudged a bankrupt, or taking the benefit of any Act for the relief of insolvent debtors, or entering into an arrangement

to pay his creditors less than twenty shillings in the pound, or dying in insolvent circumstances, the lender of any such loan as aforesaid shall not be entitled to recover any portion of his principal, or of the profits or interest payable in respect of such loan, nor shall any such vendor of a goodwill as aforesaid be entitled to recover any such profits as aforesaid, until the claims of the other creditors of the said trader for valuable consideration in money or money's worth have been satisfied." **616.**

Interpretation of "person."

6. "In the construction of this Act, the word 'person' shall include a partnership firm, a joint-stock company, and a corporation." **617.**

Dormant partner.

A dormant partner (that is, one who participates in the profits, but does not appear to the world as a partner) is responsible for the engagements of the firm. (Sm. Merc. Law, 21; 2 Ste. Com. 100; Tudor Ca. on M. L. 311; Lindley, 34, 902; Chit. Con. 218; Ad. Con. 662.) **618.**

Nominal partner.

Even without entering into any contract, a man may incur the liabilities of a partner, as between himself and third persons dealing with the firm, by lending his name and credit to a firm, or in any manner holding himself out as a partner therein, if such holding out

has come to the knowledge of such third persons. Such a person is called a nominal partner. (Sm. Merc. Law, 24; Broom Com. 540; 2 Ste. Com. 100; Tudor Ca. on M. L. 212; Lindley, 902; Chit. Con. 218; Ad. Con. 665–6; *Martin* v. *Gray*, 14 C. B. (N. S.) 824.) **619.**

Admission of a new partner.

A new partner cannot be introduced without the consent of every member of the firm; insomuch that the executors of a deceased partner do not become partners in his stead, unless the partnership contract contains a stipulation that they shall be admitted in his place, or they have entered into some agreement to that effect, express or implied. (Sm. Merc. Law, 25, 32; Tudor Ca. on M. L. 304; Ad. Con. 640; Lindley, 702, 890; *Holme* v. *Hammond*, L. R. 7 Ex. 218.) **620.**

Rights of executors of a deceased partner.

Liability of executors on becoming partners.

But if an executor once becomes a member of his testator's firm, though only in trust for the persons interested in the testator's estate, he will render himself liable, both in person and estate, for its engagements; insomuch that he may even be made bankrupt in respect of such liability. (Sm. Merc. Law, 33; Lindley, 809, 882.) **621.**

Shares.

Partners are jointly, and unless there is evidence to the contrary, are taken to be equally, interested in the partnership stock

and effects, and the profits. Yet in Equity, a partner may have little or no valuable interest in the concern, but may be indebted to it; for, in Equity, each of the partners may buy or borrow from the firm, and the firm from each of them. (Sm. Merc. Law, 29; Tudor Ca. on M. L. 306, 308, 312; Lindley, 573.) **622.**

Where all the capital is contributed by one, and all the labour by another, the latter is in some cases entitled to a share in the capital, while in others he is not; it depends upon the intention of the partnership. (Sm. Merc. Law, 30; Lindley, 573–4.) **623.**

On the death of a partner, his share in the capital stock does not go to his copartner, but forms part of his personal estate. (2 Ste. Com. 48.) **624.**

The legal interest in the choses in action of the firm survives to the other partners; so that they alone can sue at Law upon all contracts made with the firm before the dissolution; but they are trustees in Equity for the personal representatives of the deceased partner to the extent of his share. (Ad. Con. 641.) **625.**

Conduct.

A partner must be thoroughly faithful towards his copartners. He must not place himself in a situation likely to give him a

bias against his duty. And if he obtains any advantage in the course of the partnership dealings, he will be a trustee of it, in Equity, for their benefit. (Sm. Merc. Law, 30, 31; Tudor Ca. on M. L. 320, 321; Lindley, 492–3, 504.) **626.**

One partner may not exclude another from the equal management of the concern; and each partner ought to devote due time, care, and trouble to the business, and to keep proper accounts. (Tudor Ca. on M. L. 321; Lindley, 464–5.) **627.**

Power of individual partners.

Each partner is deemed the agent of the rest, whether they be actual or nominal, acting or dormant, and has authority, as such, to bind them to any person dealing bonâ fide (and without express notice from them that they will not be responsible), by such contracts respecting the goods or business of the firm as are within the ordinary scope of the partnership dealing, and even by negotiable instruments circulated in the name of the firm, where the purposes of the firm require that its members should pass such instruments, notwithstanding any agreement among the partners, unknown to such person, that no partner shall have such authority. Each partner may bind the rest by a loan or a purchase apparently connected with the

business, or by a sale or pledge of the joint property, or by a receipt, or by a bill, note, guarantee, or other security, in the name of the firm and on its behalf, where such dealings are required for the purposes of the firm, though he instantly apply the money or goods to his own use; provided the person with whom he dealt had no reason to suppose that a fraud was intended. And where an act of one partner is binding on all, each is liable upon it in his individual capacity, as regards his separate estate, as well as in respect of the partnership property. (Sm. Merc. Law, 38–43; Broom Com. 539–542; Tudor Ca. on M. L. 312, 314; 2 Ste. Com. 98–9; Lindley, 213, 214, 216; Rosc. 377, 402; Chit. Con. 228, 230, 236; Ad. Con. 653–661; Byles, 38, 43, 45, 46.) **628.**

One member of a firm of solicitors has no implied authority to bind the rest, by drawing or indorsing bills in the name of the firm, nor by drawing a post-dated cheque in the name of the firm; for, as regards its practical effect, a post-dated cheque is the same thing as a bill of exchange at so many days' date as intervene between the day of delivering the cheque and the date marked on the cheque. (*Forster* v. *Mackreth*, L. R.

2 Ex. 163; *Garland* v. *Jacomb*, L. R. 8 Ex. (Ex. Ch.) 216.) **629.**

Partners in a trade strictly mercantile may bind each other by drawing, accepting, or indorsing bills or notes in the name of the firm. (Sm. Merc. Law, 45; Lindley, 213; Ad. Con. 656, 658; Byles, 41.) **630.**

One partner has no authority, by implication of law from the mere existence of a partnership, to bind the firm by opening a banking account on its behalf in his own name. (*Alliance Bank* v. *Kearsley*, L. R. 6 C. P. 433.) **631.**

Each partner may pay or satisfy a debt so as to exonerate the firm, and may give time to a partnership debtor, and execute a valid release in the name of the firm, and thereby preclude them from suing. And payment, release, or discharge to one partner, is payment, release, or discharge to all, even after a dissolution, and notwithstanding a clause in the deed of dissolution that another partner shall receive all the debts. But partners are not bound by any contract made with their copartner, as an individual, and on his own account. (Sm. Merc. Law, 38–9, 41, 54, 57; Tudor Ca. on M. L. 331; Lindley, 221–2, 229, 232, 236; Rosc. 294, 471; Chit. Con. 235; Ad. Con. 657, 611.) **632.**

A partner cannot bind the firm by deed, unless authorised by deed to do so. (Broom Com. 544; 2 Ste. Com. 99, 100; Lindley, 223; Chit. Con. 231.) **633.**

Remedies. Action by one partner against another.

Before the Judicature Acts, one partner, as a general rule, could not sue another in a partnership matter; but an action would lie, by one partner against another, for an ascertained balance due on an account taken, and in some other cases of partnership. A partnership account was usually taken in Chancery. And if the parties could not agree as to the division of profits, those who insisted upon the immediate division of the profits had to resort to the Court of Chancery for a dissolution of the partnership, a settlement of the accounts, and a division of the balance: for, in many cases at least, the profits cannot be ascertained while the business is being carried on; and it could not be conveniently wound up except in Chancery. (Sm. Merc. Law, 34–7; Tudor Ca. on M. L. 323–6; 2 Ste. Com. 102; Broom Com. 537–8; Lindley, 735; Chit. Con. 225–7; Ad. Con. 640–646.)

Suit in Chancery.

634.

Commencement of liability, and responsibility of partners.

The liability of a partner to third persons, in respect of the engagement of his co-partners, commences with his admission into the firm, so that he will not in general be

liable on a contract effected before he was admitted. And hence an incoming partner is not liable for the price of goods sold to the firm before, though not delivered till after, he became a partner. (Sm. Merc. Law, 48; Broom Com. 546; Tudor Ca. on M. L. 314; Ad. Con. 666–7; Lindley, 311–312; Rosc. 379.) **635.**

If one partner makes an admission, acknowledgment, or representation, respecting the partnership concerns in the ordinary course of business, his copartners are generally bound by it. And if notice is given by or to one partner, respecting the partnership business, it is tantamount to notice by or to all. And if one partner is guilty of a breach of contract, negligent wrong, or fraud, in conducting the business of the firm within the scope of his authority, the others are generally liable. (Sm. Merc. Law, 47–8; Lindley, 230–253; Ad. Con. 662; Powell, 157.) **636.**

Where one partner accepts a bill, without the authority of another, when there was no drawer's name, it is not a negotiable instrument, and the other partner is not liable. (*Hogarth* v. *Latham*, L. R. 3 Q. B. D. (Ap.) 643.) **636a.**

Where two or more persons agree to furnish

a certain amount of goods, and to divide the profits, neither or none of them is or are responsible for goods bought by the other to furnish his quota. (*Heap* v. *Dobson*, 15 C. B. (N.S.) 460.) **637.**

Cessation of liability.

As to persons who have not dealt with a firm before its dissolution, the liability of a partner ceases upon his dissolving the partnership, removing his name from the firm, and giving general notice of the dissolution in the "Gazette." But particular notice must be given to persons who have previously dealt with the firm. (Sm. Merc. Law, 49; Broom Com. 547; Tudor Ca. on M. L. 315; 2 Ste. Com. 102; Lindley, 324, 327, 330, 335–6; Chit. Con. 237–8; Ad. Con. 667–8.) **638.** ...

The retiring partner will still, however, remain liable in respect of engagements prior to the dissolution, other than such as have been entered into with creditors who have expressly or impliedly agreed to the substitution of the credit of the new firm for that of the old. (Tudor Ca. on M. L. 315, 318–319; Broom Com. 547; Lindley, 337, 353.) **639.** ...

The liability of a dormant partner ceases on his retirement, except as to persons who knew him to be a partner, and to whom he

has not given notice of his retirement. (Broom Com. 548 ; 2 Ste. Com. 102 ; Tudor Ca. on M. L. 315 ; Ad. Con. 668 ; Rosc. 379 ; Chit. Con. 238 ; Lindley, 326.) **640.**

On the death of a partner, his personal representative is exonerated at Law ; but in Equity the estate of the deceased is liable until his debts have been discharged. (Sm. Merc. Law, 51 ; Tudor Ca. on M. L. 316.) **641.**

Rights of creditors.

The creditors of the partnership have a right to the payment of their debts out of the partnership funds, before the private creditors of either of the partners ; although, at Law, this has been generally disregarded. On the other hand, in Equity, the separate creditors of each partner are entitled to be first paid out of the separate effects of their debtor, before the partnership creditors can claim anything ; although, at Law, a joint creditor might proceed directly against the separate estate. (Sm. Eq. Manual, 13th ed. par. 649 ; Tudor Ca. on M. L. 316, 356.) **642.**

Dissolution.

A partnership may be dissolved : 1. By effluxion of time. 2. By mutual consent. 3. By the decree of a Court of Equity, in case the partnership undertaking originated in fraud, misrepresentation or oppres-

sion, or cannot be carried on at all, or at least according to the stipulations in the articles, or without injury to all the partners; or in case of the permanent insanity or incapacity, or the gross misconduct, as partner, of one of the firm; such as refusing to account for his receipts. 4. If no limit was originally fixed, it is called a partnership at will, and may be dissolved by either partner at a moment's notice, unless such a dissolution would be in ill-faith, or would work an irreparable injury. 5. The entire partnership is also dissolved by a general assignment by one or more of the partners, or by an execution on the partnership effects by a creditor of one of the partners, or by an assignment of his share in the business, or by the bankruptcy of any partner, or by his outlawry, or by his attainder of treason or felony. 6. And the death of a partner, or the marriage of a female partner, operates as a dissolution. But in the case of a partnership of three or more persons, the other persons may, of course, come to a new agreement to carry on the business upon the old terms. (Sm. Merc. Law, 27–8; Sm. Eq. Manual, 13th ed. par. 640; 2 Ste. Com. 98; Tudor Ca. on M. L. 331–9; Lindley, 178–187; Ad. Con. 648; Chit. Con. 237.) **643.**

CHAPTER VI.

PARTIES TO BILLS OF EXCHANGE, PROMISSORY NOTES, AND CHEQUES.

Negotiable Instruments.

CHOSES IN ACTION (*i.e.*, rights to things which are not in possession, but can only be recovered, if withheld, by an action), were not assignable at Law (*a*). The ownership in a chattel personal cannot, except by sale in market overt, be transferred at Law to a vendee by a person in whom it is not vested. But negotiable instruments are an exception to this rule. (Sm. Merc. Law, 202; Broom Com. 428–430; Ad. Con. 796–7; and see supra, par. 517–521.) **644.**

Transfer of property in a chattel personal by one in whom it is not vested.

An instrument is properly negotiable, when by the custom of trade it is transferable, like cash, by delivery, and when the legal right to that which is secured by it, and the right of action on it in case of default, are transferable from one person to

Negotiable instruments described.

(*a*) See the Supreme Court of Judicature Act, 1873, s. 25, clause (6), supra, par. 230.

What are negotiable.

another, so as to enable the latter to sue upon it in his own name. Thus bills, whether payable to order or to bearer, are negotiable by the law merchant ad infinitum; and notes also are negotiable; and the transfer of bills or notes vests in the assignee a right of action in his own name on the instrument assigned; and if he is a bonâ fide holder for value, he has a good title, notwithstanding any defect of title in the party (whether indorser or deliverer) from whom he took it. (Chit. B. 137; Broom Com. 428; 2 Ste. Com. 113, 121; Ad. Con. 797–8; *Crouch* v. *Credit Foncier of England*, L. R. 8 Q. B. 374, 382; Smith's L. C. 6th ed. 479.) An exchequer bill, if the blank in it has not been filled up with any person's name, is transferable by mere delivery. And a cheque or draft on a banker, unless restricted (see infra, par. 786–806), is negotiable. (Chit. B. 138.) A bill of lading for the delivery of goods to order and assigns, is a negotiable instrument, which, by indorsement and delivery, passes the property in the goods to the indorsee, subject to the right of an unpaid vendor to stop in transitu. The indorsee may deprive the vendor of this right, by indorsing the bill for a present

valuable consideration, if not merely for an antecedent consideration, where the indorsee has acted bonâ fide, and without notice. (*Pease* v. *Gloahec*, 3 Moo. P. C. (N. S.) 566, 567; *Rodger* v. *Comptoir d'Escompte de Paris*, L. R. 2 P. C. 393; *Henderson* v. *Comptoir d'Escompte de Paris*, L. R. 5 P. C. 253; Mau. & Pol. 226–7; *Chartered Bank of India, &c.* v. *Henderson*, L. R. 5 P. C. 501.) **645.**

According to the decisions by the Judicial Committee, the valuable consideration must have been a present valuable consideration. But the Court of Appeal, in *Leask* v. *Scott*, 2 Q. B. D. 376, said they were not bound by these decisions, and (whether rightly or wrongly) dissented from them, and held that a past valuable consideration was sufficient. It seems a monstrous absurdity and inconvenience that the decisions of the Judicial Committee should not be binding on the Court of Appeal, when the Judicial Committee is the Court which decides, finally, on the cases of our vast colonies and dependencies. **646.**

Instruments which are negotiable in one state may be deprived of their negotiable character. Thus, a bill, or a note, when indorsed in blank, is negotiable; yet by a

restricted indorsement, the holder may cause its negotiability to cease. (Sm. Merc. Law, 203; Ad. Con. 821–2.) **647.**

Debentures issued by a company are of recent origin; and a custom has prevailed of treating them as negotiable. But they are not so in the sense of enabling the assignee to sue on them in his own name; unless the Judicature Act, 1873, s. 25, clause (6), applies to them (see supra, par. 230); nor will the delivery of them pass the property in them to a vendee, however bonâ fide, if the transferor himself have not a good title to them; as where he is a thief or a finder. (*Crouch* v. *Credit Foncier of England*, L. R. 8 Q. B. 374, 380, 382, 386, 387.) **648.**

As to scrip certificates, by which it is certified that after the payment of certain instalments the bearer thereof would be entitled to be registered as the holder of shares in a company, it has been the usage of bankers, discounters, money dealers, and members of the Stock Exchange to buy and sell them, and to advance money on the security of them, and upon such dealings to pass them as negotiable instruments transferable by mere delivery. And if the person to whom they were issued places them with an agent,

and such agent deposits them as a security for money due from him to a person who has no knowledge of the fraud, the principal has no remedy against the bonâ fide holder for value. (*Rumball* v. *Metropolitan Bank*, L. R. 2 Q. B. D. 194.) **649.**

Bills of Exchange, Promissory Notes, and Cheques.

Bill of exchange defined.

A bill of exchange (frequently termed a draft) is a written order or request, signed, but not sealed, by one person to another, for the payment of a sum of money, at a specified time, unconditionally. The person making this order or request is called the drawer; the person to whom it is addressed, the drawee, and, if he accepts it, the acceptor; the person in whose favour it is made, the payee. Sometimes the same person is both drawer and payee. (Sm. Merc. Law, 206; Chit. B. 5; Broom Com. 433–6; Byles, 1.) **650.**

"Drawer" "drawee," "acceptor," "payee."

Accommodation bill.

An accommodation bill is a bill to which a person has put his name as a drawer, acceptor, or indorser, without value passing, merely to accommodate some other party, by enabling him to get it discounted. And it sometimes happens that two persons agree to mutually draw upon one another

without any value passing; and the drawer in each case gets his banker or some other person, relying on the credit of the drawer and acceptor, to discount the bill, so as to raise money, for purposes of speculation or other purposes; the discounter not knowing but that the full value passed, and the acceptor hoping to have funds to pay the bill at maturity. In these cases there is an implied contract by the party accommodated to pay or enable the accommodating party to pay the bill at maturity, and to indemnify the accommodating party in case he is obliged to pay it. (Ste. Lect. 50–52; Broom Com. 436, 481; Byles, 119.) **651.**

Where an indorsee of a bill is aware that it is only an accommodation bill, and has paid only part of the amount for which the bill was drawn, he can only recover what he paid. (Ad. Con. 803; Byles, 118.) **652.**

Holder of a bill. Bearer.

The owner of a bill is called the holder, or, where it is transferable by delivery, the bearer. (Chit. B. 19; Byles, 2.) **653.**

Cheque defined.

A cheque is a species of bill of exchange. It is an order or request, made in writing, or partly in print and partly in writing, to a banker by his customer, to pay a certain sum to a person or bearer or order, on demand. **654.**

A bank-note is a promissory note made by a banker, payable to a bearer on demand, and circulated and generally treated in law as money. (Sm. Merc. Law, 206; Broom Com. 473; Byles, 9, 10, 13.) **655.**

Bank-note defined.

A cheque is in general subject to the same rules as a bill of exchange. But it does not require acceptance, and, in the ordinary course, it is never accepted; and the drawer of a cheque is the principal debtor, like the maker of a note, and not a surety for the drawee, as in the case of a bill. And a cheque is not usually indorsed, unless made payable to order. It is not intended for circulation, but is given for immediate payment, and it is not entitled to days of grace. But the drawer is not discharged by the holder's neglect to present it in due time, unless the banker has failed during the interval. (Broom Com. 454; Ad. Torts, 204; Byles, 13, 17–20; Rosc. 300, 301.) **656.**

Difference between a cheque and a bill of exchange.

A promissory note (or note of hand) is a written promise signed by the promisor, but not sealed, to pay, at a specified time, a certain sum of money unconditionally. The promisor is called the maker; and the promisee, or person to whom the promise is made, is called the payee. (Sm. Merc. Law,

Promissory note defined.

"Maker."

"Payee."

206; Chit. B. 6; Broom Com. 464, 467; 2 Ste. Com. 123; Byles, 5.) **657.**

If a promissory writing, signed by a private individual, is sealed, it is a covenant, and not a promissory note, at least so as to retain its negotiable qualities. (*Crouch* v. *Credit Foncier of England*, L. R. 8 Q. B. 374, 384.) **658.**

"Maturity." A bill is said to be "at maturity" when it becomes due; and to be "taken up" when it is paid; and when a person is said to "retire" a bill, it is generally meant that he pays it before maturity, but sometimes the term is applied to a payment by the acceptor at maturity. (Byles, 205.) **659.**

"Taken up."

"Retiring a bill."

Parties to a bill or note (*a*). Those only can be parties to a bill or note who would be capable of entering into any other contract. A married woman cannot charge either herself or her husband, by making, drawing, accepting, or indorsing negotiable instruments, except as agent for her husband, or except he is under a civil incapacity of residing here, or she has been judicially separated from him. But in certain cases she may render her separate estate liable in Equity. **660.**

If, however, a bill or note is made or indorsed payable to the order of a married

(*a*) As to infants, see supra, par. 207–210.

woman, without any words excluding her husband, he may negotiate it, or may sue upon it, either in his own name or in the joint names of himself and his wife. But if it is made or indorsed payable to her alone, he cannot sue upon it in his own name only, or transfer it, but he may reduce it into possession, by receipt of the sum payable or by suing upon the instrument in the joint names of himself and his wife. (Sm. Merc. Law, 221; Byles, 58–60; Chit. B. 8, 12–17.)

661. A bill or note may be written or indorsed in pencil. (Byles, 68; Chit. B. 80.)

Requisites in a bill or note.

662. It is not essential that a bill or note be in any particular form of words. But there is an established form, to which it is very desirable to adhere, in order to prevent questions from arising. In a bill there must be an order or request, and in a note a promise, to pay. A mere supplication in a bill, or a mere acknowledgment in a note, will not suffice. The instrument must be simply for the actual payment of money in specie alone, and not "cash *or* bank-notes;" nor for the payment of money *or* the doing or not doing anything else, in the alternative, or both for the payment of money and the doing or not doing anything else. The

money payable must be a definite amount. It must be payable absolutely, and not conditionally or contingently, as to amount, event, fund, or person. And if a time is specified, the money must be payable at a time which is sure to arrive (as, for instance, on the death of the drawer's father), though it be very distant or uncertain when it will arrive. If there is any word in a note which renders the ultimate liability to pay uncertain, it will not be negotiable, but will be a mere agreement. (Sm. Merc. Law, 208–210; Chit. B. 81–90; Broom Com. 467; Byles, 6, 10, 68, 71, 83–7; Ad. Con. 814, 815.) **663.**

Form of a bill.

The following is the form of an inland bill:—

London, January 1, 1867.

£100 0*s.* 0*d.*

On demand, *or* at sight, *or* days *or* months after sight, *or* days *or* months after date, *or* at [some other period] pay to C. D. or order [*or* to C. D. or bearer, *or* to C. D. *or* to the order of C. D., *or* to bearer, *or* to my order] One hundred pounds [for value received].

JOHN WOOD.

To Mr. Thos. Jones, Merchant, Liverpool.

664.

The following is the form of a promissory note :—

Form of a note.

London, January 1, 1867.

£100 0*s.* 0*d.*

On demand, *or* at sight, *or* days *or* months after sight, *or* days *or* months after date, *or* at [some other period] I promise to pay to C. D. or order [*or* to C. D. or bearer, *or* to C. D., *or* to the order of C. D., *or* to bearer] One hundred pounds [for value received].

JOHN WOOD.

(Sm. Merc. Law, 212; Broom Com. 435, 467; 2 Ste. Com. 123; Byles, 68–80; Chit B. 97, et seq.) **665.**

A mere acknowledgment of a debt, called an I O U, which requires no stamp, and on which an action may be brought, is often made thus:

London, January 1, 1867.

Mr. A. B.

I O U £100.

C. D.

(Byles, 11, 26, 27; Trower, 176–7.) **666.**

If an I O U is not addressed to anyone, it is evidence for the person who sues on it,

if produced by him. (Byles, 27; Trower, 177.) **667.**

An I O U is not negotiable. (Trower, 177.) **668.**

If an I O U contains words which make it amount to a promissory note or an agreement, it will be so regarded, and must be stamped as such. (Byles, 27.) **669.**

Place and amount in the case of a bill or note.

It is not essential to state the place of making a bill or note, or to superscribe or subscribe, in figures, the sum payable. (Byles, 69, 70; Chit. B. 98, 100.) **670.**

Date.

A date is not essential to a bill or note. If omitted, the instrument will be considered as dated at the time it was made. (Byles, 69; Sm. Merc. Law, 215; Chit. B. 99.) **671.**

Time of payment.

A bill or note may be made payable at any period or on any event, however distant, if it must arrive or happen. If no time of payment is expressed, the amount will be payable on demand. (Byles, 71, 85, 86; Chit. B. 100–1.) **672.**

"After sight."

The words "after sight," in a bill, mean after acceptance, or protest or noting for non-acceptance; and, in a note, "after presentment for sight." (Byles, 189, 192; Chit. B. 257–8; Bayley, 6th ed. 243–4.) **673.**

"On demand."

The words "on demand," do not import that it is necessary to make a demand be-

fore the bill or note will become payable, but merely denote that the debt is due and payable immediately, so that an action will be a sufficient demand. And hence, if a bill or note is payable on demand, the Statute of Limitations runs from the date of the instrument, without waiting for a demand. (Byles, 320; Chit. B. 389.) **674.**

"Month." In the case of a bill or note, a month means a calendar month. (Byles, 188; Sm. Merc. Law, 215; Chit. B. 257; Chit. Con. 641.) **675.**

Consideration. A valuable consideration is necessary to support a bill or promissory note. Money advanced and received as a gift cannot form a consideration for a note signed some time afterwards. A promissory note, as between the original parties to it, is no more than an express promise to pay a sum of money; and an express promise for an executed gratuitous consideration is a nudum pactum; and from a nudum pactum no action arises. (*Hill* v. *Wilson*, L. R. 8 Ch. Ap. 888, 894, 901.) **676.**

A pre-existing debt is a sufficient consideration to support a bill or note received bonâ fide and without notice of any infirmity of title on the part of the debtor. And the same law applies to a cheque. (*Currie*

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v. *Misa*, L. R. 10 Ex. (Ex. Ch.) 153; 1 Ap. Cas. 554.) **677.**

A bill or note is primâ facie presumed to have been given for a sufficient consideration, unless, in an action between the immediate parties to it or their representatives (as between the drawer and acceptor of a bill, or a payee and drawer of a bill, or the payee and maker of a note, or between an indorsee and *his* indorser), the defendant sets up a primâ facie case, as a defence in toto, that he received no consideration, or as a defence pro tanto, that he received no sufficient consideration, or unless the defendant makes out a primâ facie case of loss, theft, fraud, forgery, or other illegality. But the want of consideration as between the immediate parties to it will not constitute a defence in an action by a holder who is not one of the immediate parties, if he or some intermediate holder between him and the defendant took the bill or note bonâ fide and paid a valuable consideration for it; as where the action is brought by the payee against the acceptor, or by an indorsee against the acceptor, or by an indorsee against a remote indorser. (Sm. Merc. Law, 269, 270; Byles, 108–9, 112, 117; Chit. B. 47, 50; Broom Com. 433, 479, 480;

Sm. Con. 143–4; 2 Ste. Com. 122; Rosc. 291; Ad. Con. 802; Chit. Con. 17, 18.) **678.**

Felony, fraud, forgery, or illegality.

Felony, fraud, forgery, or illegality, vitiates a bill or note in the hands of the immediate parties, and also in the hands of third persons who have not given value for it, or have taken the instrument after it was due, or have taken it with notice from a person who is not an innocent indorsee for value. (Sm. Merc. Law, 272; Chit. B. 53–5, 62; Byles, 132, 142; Broom Com. 480; Sm. Con. 250; Rosc. 293; Ad. Con. 801–2.) **679.**

"For value received."

The words "for value received" are not necessary. (Byles, 76; Chit. B. 110.) **680.**

Inland and foreign bills or notes.

Bills or notes are either inland or foreign. **681.**

An inland bill or note is one drawn or made in any part of the United Kingdom or adjacent islands, and made payable or drawn upon any person resident there. A foreign bill or note is one drawn or made or payable, or both drawn or made and payable abroad. (Sm. Merc. Law, 211; Byles, 366; Chit. B. 5; Broom Com. 461; 2 Ste. Com. 113; Rosc. 265; 19 & 20 Vict. c. 97, s. 7.) **682.**

Foreign bills in parts.

Foreign bills are often drawn in three or more parts; all the parts being numbered,

and together making what is called a set, and the whole set constituting but one bill. Each part contains a condition that it shall continue payable so long only as the others remain unpaid. This practice is adopted in order that if one be lost, the person entitled may recover his money on the other. (Chit. B. 104; Sm. Merc. Law, 219; Byles, 362–3; Broom Com. 461.) **683.**

By what law bills are governed.

In the case of a bill drawn in one country and payable in another, the obligation of the acceptor, and of an indorser as his surety, is governed by the law of the place where it is payable; but the obligation of the drawer by the law of the country where it was drawn. (Sm. Merc. Law, 212; Byles, 371–3; Chit. B. 116; Ad. Con. 1035; *Rouquette* v. *Overmann*, L. R. 10 Q. B. 525, 536–7.)) **684.**

On a bill of exchange payable to order, drawn, accepted, and payable in England, an indorsee may sue the acceptor in England, if the indorsement was valid by the law of England, though made in France and invalid there, and though the parties were all French subjects domiciled and resident in France. (*Lebel* v. *Tucker*, L. R. 3 Q. B. 77.) **685.**

Original transfer of a bill or note.

If a bill or note is made payable simply to a particular individual, without the word

"bearer" or "order," it is not negotiable, though it is valid as between the original parties. If it is payable to a particular individual or his order or assigns, he may transfer his right to a third person by writing his own name upon it and delivering it to such third person; which is called an indorsement, because the name of the transferor is usually written on the back. If the bill or note is payable to bearer generally, or to a particular individual or bearer, it may be transferred by mere delivery. (Sm. Merc. Law, 216; Chit. B. 109, 110, 160–1; Byles, 1, 136–8; Ad. Con. 798, 815, 816; *Harrop*, app., *Fisher*, resp., 10 C. B. (N. S.) 196.) **686.**

Designation of payee.

The payee may be designated either by name or by description; as "the trustee acting under A.'s will:" or the payee may be a fictitious person, or a blank may be left for the payee's name; in which case any bonâ fide holder may insert his own name, and recover against the drawer, or, if authorized by the drawer to insert it, against the acceptor. (Sm. Merc. Law, 217; Byles, 72, 74; Chit. B. 90, 106, 160.) **687.**

Application of the law of bills to notes.

The law of bills is generally applicable to notes. But as in bills there are three original parties, namely, the drawer, the drawee, and the payee, but in notes only two original

parties, namely, the maker and the payee, the points respecting the drawee and an acceptance have no application to a note. (2 Ste. Com. 123.) **688.**

Similarity of a note, when indorsed, to a bill.

But if indorsed by the payee, a promissory note becomes exactly similar to a bill of exchange; for then it is in effect an order by the indorser of the note upon the maker to pay to the indorsee; the indorser then stands in the situation of the drawer of a bill; the maker is in the position of the acceptor of a bill, as the person primarily liable; and the indorsee becomes the payee. (Sm. Merc. Law, 207; Chit. B. 6, 134; Broom Com. 468–9; 2 Ste. Com. 124.) **689.**

Indorsement of bills or notes. Full or special indorsement.

Indorsements are either in full or in blank. A full or special indorsement is one which mentions the name of a person in whose favour it is indorsed; as where it is made payable by the indorsement to C. D. or order.

Indorsement in blank.

An indorsement in blank is one which is effected by the holder merely writing his own name on the bill (usually and properly on the back of it), without making it payable to anyone in particular. (Sm. Merc. Law, 229; Broom Com. 437, 450; 2 Ste. Com. 114; Byles, 136–7; Chit. B. 161, 163–4; Ad. Con. 798.) **690.**

Transfer of a

A bill or note indorsed in blank passes by

mere delivery from the person to whom it was so indorsed in blank, and becomes payable to any bonâ fide holder. But a bill or note indorsed in full will not pass from the person to whom it was so indorsed in full without being indorsed by him, either in full or in blank. Whether indorsed in full or in blank, the instrument is delivered over to the assignee, who is called the indorsee; and he also may indorse it, either in full or in blank, so as to transfer it to another; and so on in infinitum. (Sm. Merc. Law, 230; Broom Com. 432, 437, 450; Chit. B. 161, 163; Byles, 136–7; 2 Ste. Com. 114; Ad. Con. 798–801.) **691.**

bill or note indorsed in blank or in full.

It will be seen from the foregoing paragraph, that a bill which has been indorsed to anyone in full may afterwards be indorsed by him in blank; and that a bill which has been indorsed in blank may afterwards be indorsed in full by the holder in favour of himself or some other person. In the latter case it will be payable to bearer, as against the drawer, the payee, the acceptor, and the blank indorsers, in the same way as if it had never been indorsed in full; but, as against the special indorser, title must be made through his indorsee. (Byles, 137–8; Chit. B. 164; Ad. Con. 798–800.) **692.**

Bill indorsed in full, and afterwards in blank; and vice versâ.

Indorsement in autre droit.

Persons acting in autre droit (as agents, executors, and administrators) may render themselves personally liable, by making, drawing, accepting, or indorsing bills or notes without using such special words as may prevent such liability. (Sm. Merc. Law, 232; Chit. B. 142; Byles, 53.) **693.**

Restrictive indorsement.

An indorsement may be restrictive, that is, so worded as to deprive the instrument of negotiability: thus, "Pay the contents to J. S. only," or "to J. S. for my use." (Sm. Merc. Law, 230; Byles, 145; Chit. B. 164; Broom Com. 450; Ad. Con. 800.) **694.**

But though an indorsement be made in full to a person without the words "or order," he may nevertheless transfer by his indorsement. And yet, as we have seen, where the drawer or maker has, in the body of the instrument, made it payable to a particular individual, without adding words of transfer, such as, "or order," it is not transferable, so as to charge the maker, drawer, or acceptor, by an assignment of the right of action. (Sm. Merc. Law, 231; Byles, 135, 137; Chit. B. 164; 2 Ste. Com. 114.) **695.**

Who may transfer.

The transfer may in general be made by any holder, or his agent, trustee in bankruptcy, or legal personal representative.

(Sm. Merc. Law, 232; Chit. B. 139, 141; Byles, 160.) **696.**

If, however, a person has stolen or found, or has no right to indorse a bill or note, which is made payable to order, and not indorsed in blank, so as to become payable to bearer, he can convey no title to it. But a person who has stolen or found a bill or note made or become payable to bearer, may convey a title to it to a person acquiring it from him bonâ fide and for valuable consideration; but not if such person takes it, without sufficient caution, under suspicious circumstances, even though he have given its full value. (Sm. Merc. Law, 233; Chit. B. 178–9; Broom Com. 452; Byles, 151, 348; Ad. Con. 801.) **697.**

Rights of bonâ fide holder for value.

A holder for value of a bill made payable to bearer or indorsed in blank, will not be affected by intermediate fraud or infirmity of title, nor bound to inquire whether the bill has been properly transferred or not, if he has taken it before it was due, and if he is a bonâ fide holder, *i.e.*, if he had no knowledge of or reason to suspect fraud or infirmity of title at the time he advanced his money on the security of the bill. And an indorsee for value may recover from an accommodation acceptor, though when the

indorsee took the bill, he knew that the acceptor had received no value ; for the very object of the acceptance was to enable the accommodated party to raise money. But if a holder is not a bonâ fide holder (as if, when he received the bill, he was aware of circumstances which rendered it improper that payment should be enforced), he will have no better interest in it than that of his transferor. (Broom Com. 451 ; 2 Ste. Com. 121 ; Byles, 31, 32, 118, 123, 142, 150–1 ; Ad. Con. 801 ; Chit. B. 168–9, 204.) And in *Foster* v. *Mackinnon*, L. R. 4 C. P. 704, it was held that an old man who indorsed a bill (the face of which he did not look at), under the false representation that it was a guarantee, was not liable to a bonâ fide holder. **698.**

Time of transfer.

The transfer of a bill by indorsement may be before acceptance, or even before its date, or before the amount is filled in, or before it is drawn, and either before, or to some extent and under certain qualifications, after maturity, that is, the time when it becomes due. If an indorsee pays a bill at maturity or after it is due, he may afterwards indorse or negotiate it. But if the acceptor or maker pays a bill or note at maturity, or the drawer of an accommodation bill pays it at

maturity, it ceases to be a negotiable instrument; no person remains liable on it, and consequently no person can sue on it. Payment before it is due does not extinguish it, any more than if it were merely discounted. (Sm. Merc. Law, 233–5; Broom Com. 456–7; Byles, 152, 157–8; Ad. Con. 798–9; Chit. B. 151, 156.) **699.**

Position of a person who takes a bill or note overdue.

He who takes a bill, note, or cheque overdue, takes it subject to the equities (if any) naturally arising out of the transaction, to which it was subject in the hands of the person from whom he received it; such as the satisfaction or payment of the bill to the prior holder: and he has no better title to it than the person from whom he takes it, if lost or stolen. (Sm. Merc. Law, 233, 272; Ad. Torts, 204; Chit. B. 153; 2 Ste. Com. 114; Byles, 154–5; Ad. Con. 803.) **700.**

Delivery.

Delivery of the bill is necessary to perfect an indorsement: but it will be presumed, unless disproved. (Byles, 139; Rosc. 270; Ad. Con. 800.) **701.**

Indorsement of bills or notes under 5*l.*

By the stat. 17 Geo. III. c. 30, if a bill or note under 5*l.* is indorsed, the indorsement must be made before the bill or note is due, and must be dated at or not before the time of making it, and must specify the name and place of abode of the indorsee, and

must be attested. (Byles, 160.) By the stat. 26 & 27 Vict. c. 105, however, this Act is repealed from the 28th of July, 1863, "for three years and until the end of the then next ensuing session of Parliament." And by subsequent Acts this repeal is continued until the 31st of December, 1880. **702.**

Operation of a bill.

A bill of exchange payable to a third person operates as an undertaking, from the drawer to the payee and every subsequent holder fairly entitled to the possession, that the drawee, who is the person primarily liable, is competent to accept, *i.e.*, to engage to pay it; and that he will, when requested, accept, and, when due, pay it: and that if the drawee fail to do either, he, the drawer, will pay the amount, provided he have due notice of the dishonour. (Sm. Merc. Law, 207; Chit. B. 133–4; Broom Com. 436, 442–3; Byles, 3; Rosc. 274; Ad. Con. 807.) **703.**

Operation of a note.

A note operates as an undertaking, by the maker to the payee and every subsequent holder fairly entitled to the possession, that he will make the payment therein specified. (Sm. Merc. Law, 208; Broom Com. 469.) **704.**

Liability of the parties to a bill or note.

Every person who indorses a bill or note becomes a surety, and undertakes thereby,

to the indorsee and every subsequent holder, that the bill or note shall be discharged by the drawee or maker when it becomes due: in fact, he is in many respects like the drawer of a new bill, and is liable to succeeding holders, in default of acceptance or payment by the drawee or maker. **705.**

The acceptor of a bill or the maker of a note is primarily and absolutely liable upon the bill or note, even after indorsement: the drawer and each indorser are only collaterally and conditionally liable to the holder, in the event of the acceptor's or maker's default, and of the holder presenting the bill according to its tenor and giving due notice of the failure of the acceptor or maker to pay upon a proper presentment. **706.**

But although all the other parties are only sureties, as between themselves and the acceptor, yet each prior party is a principal, as between himself and each subsequent party. Hence, as between the holder, on the one hand, and the acceptor and other parties, on the other, the acceptor is the principal debtor, and the other parties are his sureties. But, as between the holder, on the one hand, and the drawer who has indorsed and other indorsers, on the other, the drawer is a principal debtor, and the other

indorsers are his sureties. And each subsequent indorser is a surety for each prior indorser. But an indorser, as such, is not liable to the acceptor. And a subsequent indorser, as such, is not liable to a prior indorser. **707.**

The transfer of a bill or note by mere delivery does not amount to such an undertaking as that which an indorsement imports. (Sm. Merc. Law, 235; Byles, 3, 139, 146, 182, 224–6; Chit. B. 170–3; Broom Com. 438–471; 2 Ste. Com. 117, 118; Ad. Con. 806–7, 809; and *Woodward* v. *Pell*, L. R. 4 Q. B. 55.) **708.**

If a bill or note made or become payable to bearer is transferred, without being indorsed by the transferor, for goods or other bills or notes, or for money paid at the time by way of discount or sale, the transferor is not obliged to pay the value of the goods or refund the money, if the bill or note is bad, unless it was forged, or the transferor had reason to believe it to be of no value. (Byles, 147–150; Chit. B. 175, 296; Ad. Con. 813, 814.) **709.** ⊢

A person may indorse a bill or note in such a way as to transfer his interest to the indorsee, without rendering himself personally responsible for its payment, by adding

to his indorsement, the words "sans recours," or "without recourse to me," or equivalent words. And this qualified indorsement is the proper mode of indorsement by an agent, where it is not intended that he shall be personally liable. (Byles, 140; Chit. B. 158, 162, 166.) **710.**

And by a written or even verbal agreement that the indorsee shall not sue the indorser, an indorser may protect himself from being sued by his immediate indorsee or those merely standing on his title, but not against subsequent transferees for value without notice of the agreement. (Byles, 140.) **711.**

As between an indorser and his indorsee, there must, in order to make the indorser liable to his indorsee, be an intention to stand in the ordinary relation of indorser to him, that is, to guarantee the payment, if the acceptor makes default. (*Denton* v. *Peters*, L. R. 5 Q. B. 475.) **712.**

Note signed by a secretary.

If the secretary of an incorporated company expressly signs a promissory note as secretary, and "for" the company, though he uses the words "I promise," he will not be personally liable. (*Alexander* v. *Sizer*, L. R. 4 Ex. 102.) **713.**

Presentment of a

Every holder of a bill ought to present it

in due time for acceptance, when necessary. (Broom Com. 438; Byles, 166.) The request by the holder to the drawee, to accept the bill, is called a presentment for acceptance. (Sm. Merc. Law, 236; Broom Com. 438; Byles, 168.) **714.**

bill for acceptance.

Present-ment of a note.

As there is no drawee in a note, there can, of course, be no presentment for acceptance, but yet, when a note is payable at sight or within a certain time after sight, it must be presented to the maker in order that the time for making payment may be ascertained. (Sm. Merc. Law, 236; Byles, 71; Ad. Con. 817.) **715.**

Where presentment for acceptance is necessary.

In general, the holder of a bill is not bound to present for acceptance. But if a bill is made payable at sight or at a specified period after sight or after demand, a presentment for acceptance is of course indispensable, in order to ascertain the period when the bill is to become due. And even where presentment for acceptance is not necessary, it is usual and prudent, since the holder, if he succeeds in obtaining the acceptance of the drawee, gains the additional security of the drawee, which is likely to render the bill more negotiable; and if he does not succeed, his remedy against the drawer and indorser is accelerated; for he may sue them

immediately. (Sm. Merc. Law, 246; Chit. B. 186, 187; 2 Ste. Com. 118, 119; Ad. Con. 804; Rosc. 274; Byles, 166.) **716.**

Time for presentment.

Presentment for acceptance must be within a reasonable time, depending on the circumstances of the case. (Sm. Merc. Law, 247; Chit. B. 188; Byles, 166; Rosc. 274; Ad. Con. 804.) **717.**

Acceptance.

An acceptance of a bill is an engagement by the drawee to pay the bill, according to the tenor of the acceptance. (Sm. Merc. Law, 236, 238–9; Byles, 170.) **718.**

How made.

An acceptance must be in writing on the bill, and signed by the acceptor or by someone authorized by him. It is usually made by the acceptor writing the word "accepted" across the bill, and signing his name. (Sm. Merc. Law, 238; Broom Com. 435, 444; Chit. B. 196; 2 Ste. Com. 115; Byles, 174–5; Rosc. 265; Ad. Con. 804; 19 & 20 Vict. c. 97, s. 6; Pollock, B., in *London and South Western Bank* v. *Wentworth*, L. R. 5 Ex. D. 102.) **719.**

Stat. 41 Vict. c. 13.

By the stat. 41 Vict. c. 13, entitled "An Act to declare the Law relating to the Acceptance of Bills of Exchange" (16th April, 1878), it is enacted as follows:

Reciting 19 & 20 Vict. c. 97. 19 & 20 Vict c. 60.

"Whereas by the Mercantile Law Amendment Act, 1856, and the Mercantile Law

Amendment Act (Scotland), 1856, it is enacted that 'no acceptance of any bill of exchange, whether inland or foreign, made after the 31st day of December, 1856, shall be sufficient to bind or charge any person, unless the same be in writing on such bill, or if there be more than one part of such bill on one of the said parts, and signed by the acceptor or some person duly authorized by him:'

"And whereas doubts have arisen as to the true effect and intention of the said enactment, and as to whether the signature of the drawee alone can constitute a sufficient acceptance of the bill so as to satisfy the requirements of the said statute, and it is expedient that the meaning of the said enactment should be further declared:

"Be it therefore enacted that—

"1. An acceptance of a bill of exchange is not and shall not be deemed to be insufficient under the provisions of the said statutes by reason only that such acceptance consists merely of the signature of the drawee written on such bill.

"2. Nothing in this Act shall affect the validity or invalidity of any verdict or judgment recovered or given before the passing of this Act.

"3. This Act may be cited for all purposes as 'The Bills of Exchange Act, 1878.'" **719a.**

Acceptance when made.

An acceptance may be made even before the amount is filled in, or before the bill is drawn. (Byles, 174; Ad. Con. 798.) **720.**

Where an acceptance is so made on a stamped paper in blank, and it is delivered to another to be negotiated, the acceptor is liable to a bonâ fide indorsee for value without notice, although the person to whom the blank paper is originally given may have defrauded the man who gave it to him; because, in favour of commerce, it is essential to uphold the negotiability of bills of exchange; and because, where one of two innocent persons must suffer from the fraud of a third, the loss must be borne by him who enabled the third person to commit the fraud by accepting in blank. (*London and South Western Bank* v. *Wentworth*, L. R. 5 Ex. D. 96, 99, 101.) **720a.**

Time allowed to accept.

On presentment for acceptance, the drawee is entitled to a reasonable time to decide whether he will accept. Under ordinary circumstances, custom allows twenty-four hours. (Byles, 169; Chit. B. 195; Ad. Con. 804.) **721.**

Different kinds of acceptances.

An acceptance may be either absolute (otherwise termed general) or qualified. An

absolute acceptance is an engagement to pay according to the tenor of the bill. A qualified acceptance may be either conditional, to pay on a contingency, or partial, or varying from the tenor of the bill, as to amount, time, place, or mode of payment. The holder is not bound to take a qualified acceptance, but is entitled to an absolute acceptance, specifying a place for payment, if none is mentioned in the bill; and stating the time of presentment for acceptance, if the bill is payable after sight. If, however, he takes a qualified acceptance, he must give notice of the precise nature of the acceptance to all the antecedent parties, and should state that he is ready to take it, if they will consent. If he refuses such an acceptance, he must give notice of dishonour to them. (Sm. Merc. Law, 238–9; Broom Com. 445, 446; Chit. B. 198–9, 201–2, 216; Byles, 177–9; Rosc. 266; Ad. Con. 804.) **722.**

A bill may be either accepted simply, or accepted payable at a banker's. And a bill may be made payable at one place, and accepted payable at another place. If a person draws or accepts a bill payable at the house of a banker or other place, without the expression of an intention that it should not be payable elsewhere, there, in an action

against the *acceptor*, such acceptance is to be deemed a general acceptance; so that presentment at that place need not be averred or proved; and presentment for payment, either at the banker's or at such other place or to the acceptor himself, will suffice. But it is otherwise in the case of a note, or of an action against the drawer or indorsers of a bill drawn or accepted payable at a particular place; for, in such case, the bill must have been presented there, in order to charge the drawer or indorsers. (Sm. Merc. Law, 245; Broom Com. 446–7; 2 Ste. Com. 115–6; Byles, 79, 180, 196–9; Ad. Con. 808; Rosc. 266, 275–6; 1 & 2 Geo. IV. c. 78, s. 1.) **723.**

What an acceptance admits.

He who accepts a bill thereby admits the drawer's capacity to make it, and the payee's capacity to indorse, and if he accepted after sight of the bill, he thereby admits the drawer's signature also. (Sm. Merc. Law, 239; Byles, 184–5.) **724.**

Acceptance for honour.

Where the drawee cannot, will not, or does not accept, and the bill is protested for non-acceptance, or where the bill is protested for better security, as where the acceptor is insolvent, some other person sometimes accepts the bill for the honour of one of the parties. This acceptance for honour, as it is termed, if the holder chooses to take it,

enures for the benefit of all the parties subsequent to him for whose honour it was made; for the acceptor for honour becomes liable to them. Such an acceptance amounts to an undertaking to pay, if the drawee do not. And hence a bill so accepted must be presented to the drawee for payment when it falls due, even though he may have before refused; and if he again refuses, the bill must be again protested; and notice of the non-payment by him must be given to the acceptor for honour. Even though the acceptor for honour may have accepted without the knowledge of the party for whose honour he accepted, yet he has his remedy against such party and those whom that party might have sued, and therefore, where the bill has been protested for better security, against the drawee, if he has accepted. The drawee himself, however, may accept for the honour of some other party, though he may refuse to accept generally or simply. (Sm. Merc. Law, 240, 241; Chit. B. 237–9, 243; Broom Com. 449, 450; 2 Ste. Com. 120; Byles, 243–7.) **725.**

It is sufficient if the bill is presented, or forwarded for presentment, to the acceptor, for honour, the day after it is due. (6 & 7 Will. IV. c. 58.) **726.**

Acceptance supra protest.

An acceptance for honour is generally, if not invariably, after a protest, and hence is often termed an acceptance supra protest. (Sm. Merc. Law, 241; Chit. B. 237; Byles, 243.) **727.**

Drawing, accepting, or indorsing per proc.

A bill may be drawn, accepted, or indorsed by a person "per proc.," that is, per procuration; which imports that the drawer, acceptor, or indorser is acting as agent under a special authority; and if he has no authority, or has exceeded his authority, the holder of the bill will have no redress against the principal or supposed principal. (Broom Com. 449; Byles, 30, 33; *Stagg* v. *Elliott*, 12 C. B. (N. S.) 373; see infra, Part III., Tit. III., Cap. II.) **728.**

Revocation of acceptance.

An acceptance is revocable, and may be cancelled before the bill is delivered or the acceptance communicated to someone interested in it. (Byles, 180–1; Chit. B. 206–7.) **729.**

Where presentment for payment is necessary.

A presentment to the acceptor or maker for payment is not generally necessary in order to charge him, even in the case of a bill or note made payable on demand; the commencement of an action against him being a sufficient demand. But if a bill or note is payable at or after sight or at a particular place, presentment is necessary

even to charge the acceptor or maker. And the presentment to the acceptor or maker for payment is necessary in all cases where it is sought to charge the indorser or any party who might sue on it after paying it. (Sm. Merc. Law, 242–3, 246; Byles, 189, 199, 320; Rosc. 298–9; Ad. Con. 816, 817.)

730.

To whom presentment for payment should be made.

It is not necessary to make a personal demand on the acceptor. It is sufficient to demand payment of the acceptor's wife or other agent, at his residence or place of business. Where a bill or note is made or accepted payable at a particular place, a presentment at all the banking-houses in that place will suffice. If the maker or drawee is dead, the presentment must be to his legal personal representative, or if he has none, at his house. (Sm. Merc. Law, 244; Byles, 186, 188, 197; Rosc. 275; Ad. Con. 807.) **731.**

When presentment for payment must be made.

In order to charge the drawer or indorsers of a bill, a holder must promptly present it for payment when it becomes payable as a matter of right; and the rule is, that if a bill is payable on demand in the place where it is received, it must be presented during banking hours, if the person to pay is a banker, or otherwise at a reasonable

hour, not later than the day after it is received. If payable elsewhere, it must be forwarded by the regular post, not later than the day after it is received, or, in the case of a foreign bill, by the next ordinary conveyance; and it will suffice if the party receiving it by post presents it on the next day. (Sm. Merc. Law, 248–9; Byles, 193–5; Chit. B. 263–5; Ad. Con. 807; *Rouquette* v. *Overmann*, L. R. 10 Q. B. 525, 539.) **732.**

Days of grace.

Though a bill or note be expressed to be payable on or after a particular day, time, or event, yet in cases not within the stat. 34 & 35 Vict. c. 74, it has been deemed not to be really payable till the expiration of a certain number of days afterwards, called days of grace, which vary in number in different countries. In England, three days of grace are allowed, unless the third day is a day of public rest; in which case the bill or note is payable on the second day. In computing the time when a bill or note falls due, the day of its date is excluded. And so, in reckoning the days of grace, the day on which the bill or note falls due is excluded, but the last day of grace is included. Thus, a bill payable six days after sight would purport to be payable on the seventh

and must be presented on the tenth. But in the case of a bill or note expressed to be payable on demand or payable generally (which is in effect on demand) no days of grace are allowed. And in such case, if the bill or note falls due on a day of public rest, it must be paid on the preceding day. (Sm. Merc. Law, 249–251; Chit. B. 258–261; 2 Ste. Com. 115; Byles, 190–1, 195; Rosc. 275; Ad. Con. 809.) **733.**

Bills payable at sight or on presentation to be payable on demand.

By the stat. 34 & 35 Vict. c. 74 (passed 14th August, 1871), entitled, "An Act to abolish Days of Grace, in the Case of Bills of Exchange and Promissory Notes payable at Sight or on Presentation," after reciting that "doubts have arisen whether by the custom of merchants a bill of exchange or promissory note purporting to be payable at sight or on presentation is payable until the expiration of a certain number of 'days of grace,'" and that "it is expedient that such bills of exchange and promissory notes should bear the same stamp, and should be payable in the same manner as bills of exchange and promissory notes purporting to be payable on demand," it is enacted as follows:—

"This Act may be cited as 'The Bills of Exchange Act, 1871.' (s. 1.) **734.**

"Every bill of exchange or promissory note, drawn after this Act comes into operation and purporting to be payable at sight or on presentation, shall bear the same stamp, and shall, for all purposes whatsoever, be deemed to be a bill of exchange or promissory note payable on demand, any law or custom to the contrary notwithstanding." (s. 2.) **735.**

"For the purposes of this Act, the terms 'bill of exchange' and 'promissory note' shall have the same meanings as are given to them in the Stamp Act, 1870." (s. 3.) **736.**

Bank holidays.

In the case of bank holidays, *i.e.*, Easter Monday, the Monday in Whitsun week, the first Monday in August, and the 26th of December, if a week-day, and such other days as may be appointed, it is enacted by the stat. 34 & 35 Vict. c. 17, that all "bills of exchange and promissory notes which are due and payable on any such bank holiday shall be payable, and in case of non-payment may be noted and protested, on the next following day, and not on such bank holiday; and any such noting or protest shall be as valid as if made on the day on which the bill or note was made due and payable; and for all the

Bills due on bank holidays to be payable on the following day.

purposes of this Act the day next following a bank holiday shall mean the next following day on which a bill of exchange may be lawfully noted or protested." (s. 1.)

737. Provision as to notice of dishonour and presentation for honour on bank holidays.

"When the day on which any notice of dishonour of an unpaid bill of exchange or promissory note should be given, or when the day on which a bill of exchange or promissory note should be presented or received for acceptance, or accepted or forwarded to any referee or referees, is a bank holiday, such notice of dishonour shall be given and such bill of exchange or promissory note shall be presented or forwarded on the day next following such bank holiday." (s. 2.)

738. General regulation as to any payments or other acts on bank holidays.

"No person shall be compellable to make any payment or to do any act upon such bank holidays which he would not be compellable to do or make on Christmas Day or Good Friday; and the obligation to make such payment and do such act shall apply to the day following such bank holiday; and the making of such payment and doing such act on such following day shall be equivalent to payment of the money or performance of the act on the holiday." (s. 3.)

739.

Usances.

A foreign bill is frequently drawn payable at one usance, or two or more usances. A usance is the period for payment which is customary between the places where the bills are drawn and payable; and a half usance is half that period. Thus, a usance between this country and Venice being three calendar months, and six days of grace being allowed, exclusive of days on which the bank is shut, a bill drawn on Venice at two usances, and dated the 1st of January, would be actually payable on the 7th of July, or, if a Sunday, holiday, or day on which the bank is shut intervened, on the 8th of July. (Sm. Merc. Law, 251; Chit. B. 254; Byles, 71, 189; Broom Com. 461.) **740.**

Consequence of non-presentment in due time.

The maker or acceptor will not be discharged by non-presentment for payment on the very day when the bill or note becomes due; because they are the parties originally and primarily liable. But the drawer and all the indorsers, who are looked upon as sureties for the acceptor, will be discharged, if a presentment is not made upon the very day, or if proper notice of dishonour is not given, even though the drawer or indorsers may have knowledge of the fact. This rule would seem to depend on the principle that the enforcing the presentment for payment

and the giving notice of dishonour in proper time, generally tends to give the drawer of the bill or an indorser of the bill or note a better opportunity of withdrawing his effects from or preventing them from reaching the drawee or maker, for which the bill or note is supposed to be drawn or made; and to give the indorsers a better opportunity of recovering the money; and to let the parties know that the holder does not intend to give credit to the acceptor. (Sm. Merc. Law, 248; Broom Com. 438–441; Chit. B. 244–5, 302; 2 Ste. Com. 116, 117; Byles, 199, 225.)

741.

Notice of dishonour.

Except under certain special circumstances, if a bill or note is refused acceptance or payment, notice of such refusal, technically termed dishonour, must be given by the holder or some other party to the bill or note, who is liable to be sued and may be entitled to sue upon it, or by an agent who holds the bill, as a banker or solicitor, even in the agent's own name, to the drawer (unless he had no remedy against any one, and therefore could not be prejudiced by want of notice), or to the indorser immediately preceding the party by or on whose behalf such notice is given, or to any one or more of the other prior indorsers, to whom

he wishes to resort, even though they may be aware of the dishonour or of the insolvency of the drawee or acceptor, or to the agent or the personal representative or the trustee in bankruptcy of such party or parties. A notice to the acceptor, or maker, or to a transferor without indorsement of a bill or note transferable by mere delivery, is not necessary. **742.**

A notice, given within due time, by the holder or by a party who is liable to be sued and may be entitled to sue, will enure to the benefit of all antecedent and subsequent parties, so as to render it unnecessary for any of these parties themselves also to give notice to the same person to whom notice was so given. So that a notice by the last indorsee to the drawer will operate as a notice from each indorser to the drawer. **743.**

The best course for the holder to adopt, is, to give notice to all the parties whom he wishes to sue, lest they should not receive notice in due time from any other party. But the holder can sue the drawer, even upon a notice given to the last indorser only, if each indorser has in due time given his notice of dishonour to his next preceding indorser and the first indorser to the drawer. Default on the part of any one indorser in giving

notice in due time breaks the chain of notices, and disqualifies the holder from suing the drawer, or any indorser prior to the defective link, unless notice has been given by the holder himself to the drawer or any such prior indorser, within the time allowed the holder for giving notice. (Sm. Merc. Law, 252–3; Chit. B. 186, 218, 302, 327, 331–337; Byles, 265–282; 2 Ste. Com. 117, 118; Broom Com. 438, 440–1, 458, 471; Rosc. 278, 283; Ad. Con. 810–813; *Turner* v. *Samson*, L. R. 2 Q. B. D. (Ap.) 23; *Foster* v. *Parker*, L. R. 2 C. P. D. 18.) **744.**

When notice of dishonour should be given.

Notice, whether given by the holder, or by any indorser or other person who has himself received notice, must, if given to a party who resides in or near the place where the bill was dishonoured or where the giver of the notice himself received notice, be given in such a manner that such party may receive it by the expiration of the day after the dishonour, or after the time when the giver of the notice himself received notice. Notice to a party who is not living in or near the same place, must be given by the post of that day, or the post of the next post day, or, in the case of a foreign bill, by the next ordinary conveyance. These rules express the amount of time allowed under ordinary

circumstances. But in certain special cases where it is impossible to give notice within the time, as where the abode or place of business of the person to whom notice is to be given connot be found, such further time is allowed as may be reasonable. **745.**

If the holder, instead of trusting to others to give or forward notice, himself gives notice to all the prior parties, he has only the same time for giving notice to all, as to one. Each indorser or other party, however, "has his day" for giving notice; that is, the time above specified. But if any indorser gives notice sooner than he need, no more time will be allowed on that account to the other parties to give notice. A banker with whom a bill is deposited to receive payment has a day to give notice to his customer, and the customer has another day to give notice to the antecedent parties. Sundays, and other days of public rest, and days on which the peculiar creed of the religious denomination to which a man belongs prohibits him from transacting his ordinary business, are excluded from the time within which notice of dishonour must be given. And if a person receives on such a day notice of dishonour, he will be considered as having received it on the follow-

ing day. (Sm. Merc. Law, 259–261; Broom Com. 458–9; Byles, 260–265; 2 Ste. Com. 117; Chit. B. 326–332; Rosc. 279, 281; Ad. Con. 810, 811; *Berridge* v. *Fitzgerald*, L. R. 4 Q. B. 639; *Gladwell* v. *Turner*, L. R. 5 Ex. 59.) **746.**

Notice of dishonour need not be given to an indorser before his right to demand payment of the acceptor has accrued, and the liability of the indorser consequent on such refusal has arisen. (*Rouquette* v. *Overmann*, L. R. 10 Q. B. 525, 539.) **747.**

What amounts to notice.

The notice may be either written or verbal, and if a written notice is despatched by the post, it is sufficient, though it be not received. (Sm. Merc. Law, 261; Chit. B. 319; Byles, 252, 258; Broom Com. 460; Rosc. 278, 281; Ad. Con. 811.) **748.**

Consequence of not giving notice of dishonour.

The holder must prove that notice of dishonour was given in due time, and was received, or is to be deemed to have been received, before action brought: otherwise the drawer and indorsers will be discharged. (Byles, 265, 273; Chit. B. 302, 325; Broom Com. 438, 471; 2 Ste. Com. 116, 117.) **749.**

Protesting or noting for non-acceptance or non-payment.

On the day of dishonour of a bill which is to be protested, a consul or notary public again presents or causes it to be presented, and if acceptance or payment is again

refused, he makes a minute thereof, which is called noting the bill, from which he afterwards draws up a protest. A protest is a minute of the non-acceptance, or non-payment, and of the reason, if any, assigned, accompanied by a solemn declaration, on the part of the holder, against any loss to be sustained thereby, written under a copy of the bill, and made out by a consul or notary public, or if there is no consul or notary near, then by a substantial inhabitant in the presence of two witnesses. (Sm. Merc. Law, 258; Chit. B. 225; 2 Ste. Com. 119; Byles, 238, 239; Ad. Con. 811.) **750.**

A foreign dishonoured bill should in general be protested, and information of the protest sent with the notice of dishonour, if the person to whom the notice of dishonour is given is abroad. Foreign promissory notes need not be protested. Inlands bills may be protested, but it is not necessary or usual: they are usually noted for non-payment, although even that is unnecessary. (Sm. Merc. Law, 258; Chit. B. 324; Byles, 237, 241; Broom Com. 461; 2 Ste. Com. 119; Rosc. 282; Ad. Con. 811.) **751.**

Protest for better security.

If the drawee absconds or becomes insolvent, the holder may protest the bill for better security. The effect of this is, not

to compel anyone to give better security, but, by giving notice of the protest to the drawer and indorsers, to lead them to provide other means for the payment, or enable some one, if disposed, to give an acceptance for honour, which he could not do unless the bill were protested. (Byles, 239; Chit. B. 237; Bayley, 181.) **752.**

Payment.

The payment of a bill or note must be made at some time within business hours, in the course of the day when it is due, to the true holder or his representatives. (Sm. Merc. Law, 264; Byles, 202, 206.) **753.**

Against whom payment may be enforced.

The holder of a bill may enforce payment by action against the drawee, if he has accepted. If the bill has been dishonoured, by non-acceptance or non-payment, the holder may also enforce payment by action against the drawer and the indorsers, if any, whose names were on it when first it became the property of the holder, and who have had due notice of dishonour; but not against any subsequent party. (Sm. Merc. Law, 266; Chit. B. 362; 2 Ste. Com. 116; Byles, 139, 142; Rosc. 265, 270, 273, 274, 285; Ad. Con. 807.) **754.**

Each indorser who in turn is called upon and obliged to pay, may have recourse to any indorser, prior to himself in order, who

has had due notice of dishonour; each indorser (usually beginning at the last) taking back from his immediate indorser, what he himself has paid on account of the bill, and at the same time delivering up the bill to him: or any indorser so obliged to pay may sue the drawer or acceptor, instead of any preceding indorser. (2 Ste. Com. 117, 118; Ad. Con. 806; Chit. B. 170; Byles, 225.) **755.**

Where a bill not payable to the drawer's own order has been dishonoured, and the drawer takes it up, that is, pays it, he may sue the acceptor. (Rosc. 273.) **756.**

As the maker of a note is the person primarily and absolutely liable, even after indorsement, the holder of an indorsed note must present it in the first instance to the maker for payment; but, on his failure to pay, the holder may resort to the indorsers. Each indorser, however, after the first, has the right of recourse against the persons whose names are anterior to his own; but the first indorser or original payee has no remedy except against the maker himself. (2 Ste. Com. 124; Ad. Con. 816.) **757.**

The holder is not obliged to proceed against one party only. He may separately sue, in distinct actions, all the parties either

contemporaneously or successively; but on payment of the bill and costs by one, proceedings against the others will be stayed. (Sm. Merc. Law, 266; Chit. B. 364; Byles, 379.) Anyone who discharges a bill, thereby becomes a holder. (Sm. Merc. Law, 267.) **758.**

Amount recoverable.

In general the holder may recover the whole sum expressed to be payable in the bill or note, with interest (*a*), and all expenses occasioned by non-acceptance or non-payment. If the holder is not entitled to the whole sum, he may still recover it, and will then become a trustee of the surplus for the person who has a right thereto. (Sm. Merc. Law, 267; Chit. B. 431–9; Byles, 284–7.) **759.**

Defacing stamp on payment.

Whenever a bill of exchange, draft, or order, having thereon an adhesive stamp, is presented for payment, the person to whom the same is presented, must, under a penalty of 20*l.*, upon paying the same, write or impress, or cause to be written or impressed, upon every stamp affixed to the bill, the word "paid," to the end that the stamp may be incapable of being used again. (23 Vict. c. 15, s. 12.) **760.**

(*a*) As to interest, see infra, Part III., Tit. II., Cap. VII.

Receipt.

The person paying a bill or note is entitled to a receipt, which, if it is written (as it usually is) on the back of the stamped bill or note, requires no additional stamp: and where a part of the amount is paid, the person paying it should have a receipt for it written on the bill or note. (Byles, 212, 213; Chit. B. 293.) **761.**

Delivering up a bill or note on payment.

The person who pays a bill or note has a right to it as his voucher, if negotiable, but not otherwise. (Byles, 207, 212; Sm. Merc. Law, 283; Broom Com. 484–5; 2 Ste. Com. 116; Ad. Torts, 198; Rosc. 287.) **762.**

Payment supra protest or for honour.

When payment of a bill, whether inland or foreign, is refused, any party or any stranger may pay it for the honour of any of the parties, upon protesting it for non-payment at the time of his making such payment: and such payment is termed payment supra protest, or for honour. And the payer is entitled to reimbursement, not only from the person for whose honour he paid it, but from all others who are liable to that person; so that the payer has the rights of an indorsee, although he may have paid spontaneously, and although no formal indorsement or transfer be made to such payer. But the payer thereby discharges all the subsequent parties. This usage, which is

part of the law merchant, does not extend to promissory notes; for these are not intended for general circulation. (Byles, 248–250; Chit. B. 338–340; Bayley, 6th ed. 318.) **763.**

Suspension by renewal.

The holder may renew a bill or note, that is, he may take another bill or note in continuance of it, holding the first; which will have the effect of suspending his right of action on the first bill or note till the substituted bill or note is at maturity. But the taking of a new bill from the acceptor, payable at a future day, discharges the indorsers. And if the new bill is paid, the holder cannot sue on the first bill, though it may have been left in his hands. (Byles, 218, 230; Sm. Merc. Law, 275; Chit. B. 126.) **764.**

Adding a condition or qualification.

A bill or note or an acceptance cannot be rendered conditional or qualified by a contemporaneous verbal agreement. (Sm. Merc. Law, 211; Byles, 90, 179; Broom Com. 445; Chit. B. 93; Rosc. 294; *Young* v. *Austen*, L. R. 4 C. P. 553; *Abrey* v. *Crux*, L. R. 5 C. P. 37.) But a contemporaneous written agreement on a distinct paper, to renew, or in other respects qualify the liability of the maker or acceptor, is good, as between the original parties and their representatives,

but not as against third persons who have no notice of it. (Byles, 89, 179; Chit. B. 92; Broom Com. 445; Rosc. 294; *Young* v. *Austen*, L. R. 4 C. P. 553; *Maillard* v. *Page*, L. R. 5 Ex. 312.) **765.**

Where the drawer of a bill agrees, by a contemporaneous written agreement, to renew it, if circumstances should prevent the acceptor from meeting it at maturity, the acceptor is not bound to apply for a renewal during the currency of the bill: it is sufficient if he does so within a reasonable time after it becomes due, to constitute a good defence to an action upon it against the acceptor by the drawer himself, though it would be no defence to an action by an indorsee without notice of the agreement. (*Maillard* v. *Page*, L. R. 5 Ex. 312, 319.) **766.**

A verbal promise to renew, founded on valuable consideration, and made after a bill or note has been given or indorsed, will be binding. But such a promise will not be binding if contemporaneous with the drawing of the bill or note, or when made to an indorser, contemporaneous with his indorsement; because that would be to incorporate with the written contract an incongruous parol condition. (Chit. B. 94; Byles, 90; Sm. Merc. Law, 276.) **767.**

A contemporaneous indorsement, purporting to render a bill or note payable only on certain conditions, will convert it from a negotiable instrument into an agreement, as between the parties to it. (Sm. Merc. Law, 211.) **768.**

Where, after a promissory note is given for payment of a principal sum and interest on demand, a written agreement is entered into for payment by quarterly payments, with interest, the subsequent agreement is no defence to an action for the whole, if not founded on any valuable consideration. (*McManus* v. *Bark*, L. R. 5 Ex. 65.) **769.**

Alteration.

Where an alteration is immaterial (as where it only expresses the effect of the note as it originally stood), it does not render the bill or note invalid. (*Aldous* v. *Cornwell*, L. R. 3 Q. B. 573.) But any material alteration of a bill or note after it has been issued, unless satisfactorily accounted for, invalidates it, as against parties not consenting to the alteration. And even though the alteration is made by consent, the instrument is a new contract, requiring a new stamp, unless such alteration was made to correct a mistake, and render the bill or note what it was originally intended to be.

(Sm. Merc. Law, 278; Chit. B. 127–9; Byles, 298–302; Ad. Con. 819–821.) **770.**

Extinguishment.

If the plaintiff obtains from the defendant a co-extensive security of a higher description, as for instance a deed or a judgment (not being a collateral security only), the defendant's liability will be extinguished; but until satisfaction of the debt, the holder may proceed on the bill or note against any other distinct party to it not jointly liable with the original defendant. (Sm. Merc. Law, 276; Byles, 216–218.) **771.**

Satisfaction.

All parties subsequent to the person by whom a bill or note is satisfied, and all prior parties for his accommodation, are released by such satisfaction. (Sm. Merc. Law, 277.) **772.**

Discharge.

The acceptor or maker of a bill or note may be discharged, even verbally, whether before or after it is due, without any satisfaction. (Byles, 182; Sm. Merc. Law, 280; Chit. B. 207.) **773.**

If a creditor discharges the prior parties, the principal debtors, or effectually binds himself to give them time, however short, the sureties are discharged. But a discharge to the subsequent parties, the sureties, is not a discharge of the prior parties, the principal debtors. As between the holder, and the

maker of a note or the acceptor of a bill, the maker or acceptor is considered the principal, and the drawer and indorsers his sureties; and consequently, if the holder either discharges or effectually binds himself to suspend his remedy against the maker or acceptor, the drawer and indorsers are discharged thereby; unless they have previously consented to it, or waived their right of discharge by a subsequent promise to pay, with knowledge of it; or unless it was agreed at the time between the holder and the maker or acceptor that the surety should not be discharged. As between the holder and the drawer of a bill, the drawer is considered as the principal and the indorsers as his sureties. And a subsequent indorser is regarded as a surety for the prior one; and therefore, if the holder discharges, or effectually binds himself to give time to a prior indorser, he discharges the subsequent indorsers. (Sm. Merc. Law, 280–281; Chit. B. 286–9; Byles, 224–234; Ad. Con. 807; Chit. Con. 484; Rosc. 296–7.) **774.**

The holder's discharge of one joint maker of a note operates as a discharge of the other. (Sm. Merc. Law, 283; Chit. B. 289.) **775.**

Payment of a forged or

If a banker pays a forged cheque, he must

bear the loss himself; and if he pays a cheque which has been fraudulently altered in amount, he will have to suffer, unless the drawer has, by his gross fault, facilitated the commission of the fraud. (Broom Com. 455; Chit. B. 348; Ad. Con. 451; Byles, 24.)

altered cheque.

776.

A forged indorsement confers no title to a bill or cheque. (Ad. Torts, 203; *Bobbett* v. *Pinkett*, L. R. 1 Ex. D. 368; Byles, 311.)

Forged indorsement.

777.

If a banker pays a bill bearing a forged indorsement, he, and not his customer, will suffer. (Broom Com. 453; Grant, 103–4.)

778.

But a draft or order (which includes a cheque) drawn upon a banker, for a sum payable to order on demand, which, when presented for payment, purports to be indorsed by the person to whom the same is drawn payable, is a sufficient authority to the banker to pay the amount to the bearer, though the signature indorsed be a forgery. (16 & 17 Vict. c. 59, s. 19; Grant, 25; Rosc. 301.) But this enactment does not protect any other person than the banker on whom the draft or order is drawn. It does not protect any other banker who cashes it on the faith of the indorsement. So that if a

cheque is drawn upon a banker, and made payable to order, and crossed, and gets into the hands of another person, who forges the name of the payee, and gets it cashed by another banker on the faith of the indorsement, and such other banker gets the money from the banker on whom it was drawn, the drawer of the cheque can recover the money from the banker who cashed it. (*Ogden* v. *Benas*, L. R. 9 C. P. 513.) **779.**

It was held by the Court of Appeal, affirming the decision of the Court below, that an indorsement of a cheque payable to order, purporting to be by the agent of the person to whom the cheque is payable, is, within the stat. 16 & 17 Vict. c. 59, s. 19, a sufficient authority to the banker to pay the amount of the cheque, though the person who indorsed it had no authority to indorse. (*Charles* v. *Blackwell*, L. R. 2 C. P. D. (Ap.) 151.) But this decision appears to the writer to be doubtful on principle. **780.**

Lost or stolen bank-notes.

If a person steals or finds a bank-note, or discounts or cashes a bank-note for, or otherwise receives it from, one who (as he knows) stole or found it, he may be compelled by the owner to restore it. But if a person receives a bank-note from a thief or finder bonâ fide in the ordinary course of business,

the owner has no remedy against the person by whom it is so received. (Ad. Torts, 2nd ed. 276; Broom Com. 473; Grant, 421.) **781.**

Lost or stolen bills or promissory notes or negotiable securities.

The owner of a bill, note, or negotiable security, may recover it from one who discounts it, or changes it, or receives it by way of deposit, having reason to suspect that the person from whom he received it was not the owner of it. (Ad. Torts, 2nd ed. 289; Byles, 150–1.) **782.**

If a person finds or steals a bill or note which may pass by mere delivery, neither he, nor his transferee with notice of the want of title of the transferor, can retain it against the true owner, nor sue the acceptor or maker. But if he transfers it before maturity to a person who takes it without fraud, the transferee may retain it against the owner, and sue the parties liable theron. (Ad. Torts, 2nd ed. 289; Byles, 348, 353; Chit. B. 179, 180.) **783.**

If a bill or promissory note, payable to bearer, is lost, immediate notice should be given to the parties who are liable on it, and notice should also be given at once to the public by advertisement, to prevent it from getting into the hands of an innocent person for value without notice. But even if the

loss is not advertised or made known, still the loser may recover its value from any holder who has taken it under suspicious circumstances. (Ad. Torts, 2nd ed. 276; Byles, 349; Chit. B. 178.) **784.**

In the case of an action founded upon a bill of exchange or other negotiable instrument, the Court or Judge may order that the loss of the instrument shall not be set up, provided an indemnity be given against the claim of any other person upon such negotiable instrument. (17 & 18 Vict. c. 125, s. 87; Sm. Merc. Law, 286; Byles, 354; Chit. B. 185; Broom Com. 486; Ad. Con. 821.) **785.**

Crossed cheques.

By the law as it stood under the stat. 21 & 22 Vict. c. 79, if a cheque or draft on a banker, payable to bearer or to order on demand, was issued, crossed with the name of a banker, or with two transverse lines, with the words "and Company," or any abbreviation thereof, the banker on whom it was drawn might not pay it except to the banker with whose name it was crossed, or if it was crossed without a banker's name, then he might not pay it to any other than a banker. And any holder might, if it was thus crossed without the name of a banker, or was not crossed at all,

cross it with the name of a banker, or with the words above mentioned; and then it was only to be paid to the banker whose name it bore, or, if none was named, to some banker. The obliteration, adding to, or altering of, a crossing of a cheque, contrary to the Act on this subject, was a felony. But in order to protect the banker, if, when it was presented for payment, the cheque did not plainly appear to have been crossed, or obliterated, added to, or altered, he incurred no responsibility by paying it, unless he acted malâ fide or was guilty of negligence. (21 & 22 Vict. c. 79; Sm. Merc. Law, 264; Ad. Con. 453; see *Bobbett* v. *Pinkett*, L. R. 1 Ex. D. 368.) **786.**

Where the payee of a cheque indorsed it, and crossed it with the name of his bankers, and it was stolen and afterwards got into the hands of a bonâ fide holder for full value, and the banker on whom it was drawn paid it to such bonâ fide holder or his banker as a negotiable instrument, it was held by the Court of Queen's Bench, and afterwards by the Court of Appeal (improperly, as the author submits) that the payee could not recover against the banker on whom it was drawn, for breach of duty, though the statute 21 & 22 Vict. c. 79, s. 2,

enacted, that the banker on whom a cheque was drawn should not pay it to any one but the banker named in the crossing. (*Smith* v. *Union Bank of London*, L. R. 10 Q. B. 291; 1 Q. B. D. (Ap.) 31.) To remedy this contravention, by judicial decision, of a most useful Act of Parliament, another Act was obliged to be passed. **787.**

By the stat. 39 & 40 Vict. c. 81, it was enacted as follows:—

Short title. "This Act may be cited as The Crossed Cheques Act, 1876." (s. 1.) **788.**

Repeal of Acts in Schedule. "The Acts described in the Schedule to this Act (19 & 20 Vict. c. 25, and 21 & 22 Vict. c. 79) are hereby repealed, but this repeal shall not affect any right, interest, or liability acquired or accrued before the passing of this Act." (s. 2.) **789.**

Interpretation. "In this Act—

'Cheque' means a draft or order on a banker payable to bearer or to order on demand, and includes a warrant for payment of dividend on stock sent by post by the Governor and Company of the Bank of England or of Ireland, under the authority of any Act of Parliament for the time being in force: **790.**

'Banker' includes persons or a corpo-

ration or company acting as bankers." (s. 3.) **791.**

General and special crossings.

"Where a cheque bears across its face an addition of the words 'and company,' or any abbreviation thereof, between two parallel transverse lines, or of two parallel transverse lines simply, and either with or without the words 'not negotiable,' that addition shall be deemed a crossing, and the cheque shall be deemed to be crossed generally. **792.**

"Where a cheque bears across its face an addition of the name of a banker, either with or without the words 'not negotiable,' that addition shall be deemed a crossing, and the cheque shall be deemed to be crossed specially, and to be crossed to that banker." (s. 4.) **793.**

Crossing after issue.

"Where a cheque is uncrossed, a lawful holder may cross it generally or specially. **794.**

"Where a cheque is crossed generally, a lawful holder may cross it specially. **795.**

"Where a cheque is crossed generally or specially, a lawful holder may add the words 'not negotiable.' **796.**

"Where a cheque is crossed specially, the banker to whom it is crossed may again cross it specially to another banker, his agent for collection." (s. 5.) **797.**

Crossing material part of cheque.

"A crossing authorised by this Act shall be deemed a material part of the cheque, and it shall not be lawful for any person to obliterate or, except as authorised by this Act, to add to or alter the crossing." (s. 6.) **798.**

Payment to banker only.

"Where a cheque is crossed generally, the banker on whom it is drawn shall not pay it otherwise than to a banker. **799.**

"Where a cheque is crossed specially, the banker on whom it is drawn shall not pay it otherwise than to the banker to whom it is crossed, or to his agent for collection." (s. 7.) **800.**

Cheque crossed specially more than once not to be paid.

"Where a cheque is crossed specially to more than one banker, except when crossed to an agent for the purpose of collection, the banker on whom it is drawn shall refuse payment thereof." (s. 8.) **801.**

Protection of banker and drawer where cheque crossed specially.

"Where the banker on whom a crossed cheque is drawn has in good faith and without negligence paid such cheque, if crossed generally to a banker, and if crossed specially to the banker to whom it is crossed, or his agent for collection being a banker, the banker paying the cheque and (in case such cheque has come to the hands of the payee) the drawer thereof shall respectively be entitled to the same rights, and be placed

in the same position in all respects, as they would respectively have been entitled to and have been placed in if the amount of the cheque had been paid to and received by the true owner thereof." (s. 9.) **802.**

Banker paying cheque contrary to provisions of Act to be liable to lawful owner.

"Any banker paying a cheque crossed generally otherwise than to a banker, or a cheque crossed specially otherwise than to the banker to whom the same shall be crossed, or his agent for collection, being a banker, shall be liable to the true owner of the cheque for any loss he may sustain owing to the cheque having been so paid." (s. 10.) **803.**

Relief of banker from responsibility in some cases.

"Where a cheque is presented for payment, which does not at the time of presentation appear to be crossed, or to have had a crossing which has been obliterated, or to have been added to or altered otherwise than as authorised by this Act, a banker paying the cheque, in good faith and without negligence, shall not be responsible or incur any liability, nor shall the payment be questioned, by reason of the cheque having been crossed, or of the crossing having been obliterated, or having been added to or altered otherwise than as authorised by this Act, and of payment being made otherwise than to a banker or the

banker to whom the cheque is or was crossed, or to his agent for collection being a banker (as the case may be)." (s. 11.) **804.**

Title of holder of cheque crossed generally or specially.

"A person taking a cheque crossed generally or specially, bearing in either case the words 'not negotiable,' shall not have and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had. **805.**

"But a banker who has in good faith and without negligence received payment for a customer of a cheque crossed generally or specially to himself shall not, in case the title to the cheque proves defective, incur any liability to the true owner of the cheque by reason only of having received such payment." (s. 12.) (See *Matthiessen* v. *London and County Bank*, L. R. 5 C. P. D. 7.) **806.**

Bills and notes under 5*l*.

Promissory notes for less than 5*l*., payable on demand to bearer, are prohibited under a penalty. And so are all negotiable bills, notes, and undertakings for less than 20*s*., except cheques on bankers. And by the stat. 17 Geo. III. c. 30, negotiable bills or notes for more than 20*s*. and less than 5*l*. (except cheques on bankers) are also void, unless they specify the name and abode of the payee, are attested by a subscribing witness,

bear date at or before the time of issue, and are made payable within twenty-one days after date, but not to bearer on demand; and such instruments cannot be negotiated after the time limited for their payment. (Sm. Merc. Law, 213; 3 Ste. Com. 124; Byles, 17, 75, 76; Chit. B. 101; Rosc. 298; Ad. Con. 817; 17 Geo. III. c. 30; 48 Geo. III. c. 88, s. 2; 7 Geo. IV. c. 6; 17 & 18 Vict. c. 83, s. 9; 23 & 24 Vict. c. 111, s. 19.)

807.

The stat. 17 Geo. III. c. 30, is, however, repealed by the stat. 26 & 27 Vict. c. 105, "from and after the 28th of July, 1863, for three years, and until the end of the then next ensuing session of Parliament." And by subsequent statutes this repeal has been continued until the 31st of Dec., 1880.

808.

Time for presentment of cheque for payment.

A cheque should be presented for payment, or, if the parties live at a distance, forwarded for the purpose of being presented for payment, not later than the day after the day on which it is received; and, in the latter case, the person to whom it is forwarded should present it for payment the day after he receives it. But delay will not exonerate the drawer, unless the person on whom it was drawn has failed in the meantime, or

there is a loss to the drawer by the delay. (Sm. Merc. Law, 249; Byles, 18–20, 193; Ad. Con. 452.) **809.**

If a creditor takes from his debtor's agent, on account of the debtor, a cheque of the agent, and the creditor does not present it within a reasonable time, the creditor must bear any loss resulting from his delay. (*Hopkins* v. *Ware*, L. R. 4 Ex. 268.) **810.**

Duty of bankers to get cheques cashed.

If a customer pays a cheque into a bank, to be placed to his account, the banker must not delay to get the cheque paid, and to give notice to the customer in case of non-payment; otherwise the bank must bear any loss that may arise. (Ad. Con. 447–8. On this subject, see *Bailey*, app., *Bodenham*, resp., 16 C. B. (N. S.) 288; *Prideaux* v. *Criddle*, L. R. 4 Q. B. 455.) **811.**

But a country banker receiving from a customer a cheque for presentment, drawn upon another country banker not resident in the same town, is not bound to transmit it for presentment until the day following the day on which he received it. (*Hare* v. *Henty*, 10 C. B. (N. S.) 65; *Prideaux* v. *Criddle*, L. R. 4 Q. B. 455.) **812.**

Banker cannot set up jus tertii.

Whatever cheques or moneys a customer pays into the bank to his own account must

be treated by the banker as the cheques or moneys of the customer alone. The banker cannot set up the right of any third person. (Ad. Con. 450.) **813.**

Banker cannot recover from person to whom cheque is paid.

A banker cannot recover the money from the person who has presented a cheque and received payment, though the drawer may have overdrawn his account. (Ad. Con. 453; *Chambers* v. *Miller*, 13 C. B. (N. S.) 125.) **814.**

Notice of dishonour of a cheque.

Where a cheque is dishonoured, notice of dishonour must ordinarily be given to the drawer. But this is not necessary, if there were no sufficient effects at the time when the drawer would reasonably expect the cheque to be presented, and the drawer had no reasonable expectation that it would be paid. (*Carew* v. *Duckworth*, L. R. 4 Ex. 313.) **815.**

Cheque on one branch, where there is a balance, while there is a countervailing debit at another.

In the absence of a special contract to the contrary, a banker may, even without notice, refuse to honour a cheque at one branch, though the customer has a balance there, if at another branch with which the customer has also an account, there is a countervailing debit, so that the bank, as an entire concern, has not assets of his to meet the cheque. (*Garnett* v. *M'Kewan*, L. R. 8 Ex. 10.) **816.**

Altering date of cheque.

If a payee or his transferee or a third person alters the date of a cheque, whether to an earlier or later date, it invalidates the cheque. (*Vance* v. *Lowther*, L. R. 1 Ex. D. 176.) **817.**

Debts
Judgment, Specialty, Simple Contract

CHAPTER VII.

DEBTORS AND CREDITORS GENERALLY.

Debt defined. Consideration.

A DEBT is a sum due. **818.**

It is not essential to the existence of a debt, generally, that any valuable consideration should have moved from the creditor. (Trower, 2.) **819.**

Division of debts.

Debts, when classified according to the mode in which they are evidenced, are of three kinds: judgment debts, specialty debts, and simple contract debts. (Trower, 2.) **820.**

Judgment debt.

A judgment debt is a sum payable under a judgment, decree, order, or rule, either made by a superior Court of Common Law or of Equity, or having the same effect as if so made. (See Sm. Law of Prop. 5th ed. pt. 2, tit. 10, c. 3.) **821.**

Statutes and recognisances.

Statutes and recognisances are now disused: with the exception of recognisances to the Crown, in the nature of a statute staple. (Trower, 202–3.) **822.**

Elegit.

It is enacted by the Statute of West-

minster 2, 13 Edw. I. c. 18, that when a debt is recovered or acknowledged, or damages adjudged in the King's Courts, the plaintiff shall have his election either to have a writ of fieri facias, or else that the sheriff shall deliver to him all the chattels of the debtor (saving only his oxen and beasts of the plough), and also one half of his lands, until the debts shall be levied upon a reasonable price or extent: the word "price" referring to the chattels, and the word "extent" to the lands. In consequence of this statute, a writ was framed, under which the sheriff first caused the goods and chattels to be appraised by a jury; and if they were insufficient to pay the debt, then the jury put an annual value on the land, and the sheriff delivered the goods and chattels and a moiety of the land to the creditor under the old law, or the whole under the statute 1 & 2 Vict. c. 110, s. 11. This writ was called a writ of elegit, because the creditor thereby elected to sue out execution against the land, instead of proceeding at common law against the goods alone by writ of fieri facias. **823.**

Warrant of attorney to confess judgment.

In consequence of the word "acknowledge" in the Statute of Westminster 2, it became a common practice, when money is borrowed,

for the debtor not only to execute a bond to the creditor, but also a warrant of attorney, addressed to two or more attorneys, authorising them to acknowledge a judgment for the money, which enabled the creditor to sue out a writ of elegit as effectually as if the judgment had been obtained in an adversary suit. **824.**

Operation of a judgment as a charge in Equity.

Under the stat. 1 & 2 Vict. c. 110, s. 13, a judgment also operates as a charge, in Equity, upon the real estate which the debtor has or afterwards acquires, or of which he has an absolute disposing power exercisable for his own benefit; though the benefit of the charge cannot be obtained until after the expiration of one year from the time of entering up the judgment. **825.**

Protection to purchasers, mortgagees, and creditors against judgments.

As to judgments entered up before the stat. 23 & 24 Vict. c. 38, a purchaser, mortgagee, or creditor of or from the debtor is not bound even by judgments of which he had notice, unless registered within five years before the conveyance or mortgage, or before the accrual of the creditor's right. And so far as regards the extended remedies of the stat. 1 & 2 Vict. c. 110, he is not bound by judgments of which he had no notice, though they are registered. So that, as regards purchasers, mortgagees, and credi-

tors, in order to subject them to the extended remedies on judgments under the stat. 1 & 2 Vict. c. 110, both notice and registration of such judgments are necessary; but in order to subject them merely to the old remedies on judgments, prior to the stat. 1 & 2 Vict. c. 110, registration of such judgments will suffice without notice of them, although notice will not suffice without registration. **826.**

By the stat. 23 & 24 Vict. c. 38, s. 1, however, no judgment, statute, or recognisance entered up after the 23rd of July, 1860, will affect any land, as to a bonâ fide purchaser for valuable consideration, or a mortgagee, even with notice, unless a writ or other due process of execution shall have been issued and registered before the execution of the conveyance or mortgage, and the payment of the purchase or mortgage money, nor unless such process shall be executed and put in force within three calendar months from the time when it was registered. **827.**

And by the stat. 27 & 28 Vict. c. 112, no judgment, statute, or recognisance, to be entered up after the 29th day of July, 1864, will affect any land (of whatever tenure), unless such land shall have been actually delivered in execution, by virtue of a writ

of elegit or other lawful authority, in pursuance of such judgment, statute, or recognisance. (s. 1.) **828.**

The writ or other process must be registered in the name of the debtor; and no other or prior registration of the judgment, statute, or recognisance is to be necessary for that purpose. (s. 4.) **829.**

Protection to landlords against executions.

By the stat. 8 Anne, c. 4, s. 1, the goods of a tenant for a term of years may not be taken in execution, unless the execution creditor pay the rent due. But it has been held that this does not apply where the lease has expired before the distress. (*Cox* v. *Leigh*, L. R. 9 Q. B. 333.) **830.**

Elegit after a fieri facias.

If the creditor first sues out a writ of fieri facias against the debtor's goods, and they are insufficient to satisfy the debt, he may take out an elegit against his lands for the remainder of the debt. And this is the best course. **831.**

Decrees, rules, and orders, to have effect of judgments.

All decrees and orders of Courts of Equity, and all rules of Courts of Common Law, and all orders in matters of Bankruptcy and Lunacy, whereby any sum of money, or any costs, charges, or expenses, is or are payable, have the effect of judgments in the superior Courts of Common Law. **832.**

Charging orders.

A judge of one of the superior Courts of Common Law may order that any stock, funds, or shares, or the income thereof, belonging to a judgment debtor, shall stand charged with the debt; and such order has the effect of a charge. (See, on the subject of judgments, Sm. Law of Prop. 5th ed. Part II. Tit. X. Cap. III.) **833.**

From what time the goods of an execution debtor are bound.

As regards the debtor himself, and all others but purchasers for valuable consideration, writs of execution bind his goods from the time of the teste. But the property in the goods is not altered by the writ until execution and sale by the sheriff, nor even then, so long as anything remains to be done to distinguish them. And by the statute 19 & 20 Vict. c. 97, s. 1, "No writ of fieri facias or other writ of execution, and no writ of attachment against the goods of a debtor, shall prejudice the title to such goods acquired by any person bonâ fide and for a valuable consideration before the actual seizure or attachment thereof by virtue of such writ; provided such person had not, at the time when he acquired such title, notice that such writ, or any other writ by virtue of which the goods of such owner might be seized or attached, had been delivered to and remained unexecuted in the hands of

the sheriff, under-sheriff, or coroner." (Rosc. 636.) **834.**

Notice to the debtor of the delivery of the writ to the sheriff is constructive notice to the trustee of a deed of assignment afterwards made by the debtor for the benefit of his creditors; so that the trustee's title will not be protected by the Mercantile Law Amendment Act, 1856, 19 & 20 Vict. c. 97, s. 1, but the goods are bound by the delivery of the writ to the sheriff; and therefore the title of the execution creditor will prevail against the deed. (*Hobson* v. *Thelluson*, L. R. 2 Q. B. 642.) **835.**

Specialty debt.

A specialty debt is a debt resulting from an instrument sealed and delivered. (Trower, 139.) **836.**

A specialty debt had priority over a simple contract debt in the payment of a testator's or intestate's debts, except in bankruptcy. (Chit. Con. 7.) But this priority is abolished by the stat. 32 & 33 Vict. c. 46. **837.**

Simple contract debt.

A simple contract debt is a debt not secured by deed nor evidenced by record. (Trower, 167.) **838.**

Contract of debt.

A contract of debt is one whereby a definite sum of money becomes due to any person. (Sm. Merc. Law, 537; Trower, 1, 2.) **839.**

Accounts are divisible into open, stated, and settled accounts. **840.**

Division of accounts.

Open accounts.

An open account is an account of which the balance is not struck, or which is not accepted by both parties. **841.**

Stated accounts.

A stated account is one that is accepted by both parties. This acceptance need not be expressed, but may be implied from circumstances; as, if no objection is made to the account within a reasonable time. What is a reasonable time is to be determined by the habit of business; and the usual course is required to be followed, unless there are special circumstances constituting a ground for variation. Between merchants acquiescence is presumed, under ordinary circumstances, after a lapse of several posts. (Sm. Eq. Manual, 13th ed. par. 457.) **842.**

Loan for an illegal purpose.

Money lent for an illegal purpose cannot be recovered by the lender. (Chit. Con. 531.) **843.**

Where interest is payable.

The general rule at Common Law is that the law does not imply a contract to pay interest, even on money lent. **844.**

Interest may be demanded, not only where there is an express stipulation for it, written or verbal, but also where it is payable by the usage of trade or of the parties, or in the case of an overdue bond, bill, or

promissory note, or an account stated for money lent, or on money compelled to be paid by a surety. And the jury may allow interest to the creditor, on any debt or sum certain from the time when the same was payable, if payable from a time certain under a written instrument, or if payable otherwise, from the time of a written demand, with notice that interest would be claimed. Interest at 4 per cent. is payable on a judgment debt. (Sm. Merc. Law, 545–7; Trower, 78, 205–7, 304; Rosc. 416–417; Byles, 283–4; Chit. B. 433–7; Chit. Con. 9th ed. 600–4; Ad. Con. 6th ed. 1063; 3 & 4 Vict. c. 42, s. 28; 1 & 2 Vict. c. 110, s. 17.) **845.**

Where a security for money payable on a certain day stipulates for the allowance of a certain rate of interest up to that day, interest at the same rate is not implied afterwards. Interest by way of damages for the non-payment of the debt on the day fixed may be given by the Court or jury, when the creditor or his estate has not been the cause of the delay in payment, and it would be just that interest should be paid; and as a rule the interest stipulated to be paid up to the day fixed for the payment of the debt, where it is reasonable and usual, may

well be adopted, as the amount of such damages for the detention of the debt. (*Cook* v. *Fowler*, L. R. 7 H. L. 27.) **846.**

When interest commences.

Where interest is expressly made payable under an instrument, it runs from the date of such instrument. Where interest is not expressly made payable on a bill or note, it runs from the maturity of the bill or note, as against the acceptor or maker. But the drawer or indorser of a bill, or the indorser of a note, is only liable to pay interest from the time he receives notice of the dishonour. (Byles, 284–5; Chit. B. 436–7; Ad. Con. 6th ed. 1063.) **847.**

When interest ceases.

Interest ceases to run after a tender of the principal. (Byles, 285–6; Chit. Con. 438–9.) **848.**

Rate of interest.

In the absence of express enactment or contract as to the rate of interest, 5*l.* per cent. is usually allowed. But the jury may reduce or increase it. Until the stat. 17 & 18 Vict. c. 90, a higher rate than 5*l.* per cent. yearly was not permitted in any case to which the law against usury applied. That law, however, did not apply where the right to recover the money lent was, by the terms of the loan, put in jeopardy; as in the case of bottomry or respondentia, and of annuities for lives. And by the statute

17 & 18 Vict. c. 90, by one act of national wickedness, the laws against usury were repealed, so far as they do not affect pawnbrokers. (2 Ste. Com. 90–91, 95; Chit. Con. 625, 626; Byles, 287; Chit. B. 439.) **849.**

Compound interest.

Compound interest is interest upon interest, *i.e.*, interest on a balance of account in which the debtor is debited with former interest. This is allowable in some mercantile cases, where it is expressly stipulated, or where there is an implied contract for it; as where the parties had been in the habit of dealing on the footing of allowing it, or where it is the practice of a banking house, of which the customer was aware. (Sm. Merc. Law, 547; 2 Ste. Com. 96; Rosc. 417; Chit. Con. 10th ed. 597.) **850.**

Tender.

The debtor is bound to tender the principal and interest at the proper time, without waiting for a demand. (Trower, 211; Chit. Con. 639.) **851.**

Bank of England notes payable to bearer on demand are a legal tender for any sum above 5*l.*, except when the tender is made by the Bank itself, or its branches, as the debtor. (3 & 4 Will. IV. c. 98, s. 6; 7 & 8 Vict. c. 32.) Country notes or cheques are not a legal tender, if objected to on that ground. (Sm. Merc. Law, 539; Trower,

211; Rosc. 482; Chit. Con. 716, 717; Ad. Con. 1044–5; Byles, 9, 10.) **852.**

A conditional tender (as, for instance, a tender of a sum to be accepted "in full of all demands," or as "the balance due") is not a legal tender, that is, not a tender which the creditor is bound to accept. Nor is the tender of a sum exceeding the debt, and requiring change. (Sm. Merc. Law, 540; Trower, 211–212; Rosc. 482; Ad. Con. 1045–6.) **853.**

Payment through the post or a bank.

Sending money in a letter by post, or paying it into a bank, by request of the creditor, is equivalent to payment directly to him. (Ad. Con. 981.) **854.**

Payment by bill or note.

When a creditor accepts a bill or note in payment, he thereby virtually agrees to give the debtor credit for the time which it has to run, except in the case of rent or specialty debts, or unless the debtor knew the bill or note to be of no value. In general, it is no satisfaction of the debt or demand, until it is paid, unless the creditor agrees to accept it as cash, or has been guilty of laches in enforcing payment. (Sm. Merc. Law, 451–2; Byles, 218, 235–9; Rosc. 388, 472–3; Chit. Con. 679, 680; Ad. Con. 928–9, 984.) **855.**

Payment by cheque.

If a creditor takes a cheque in payment of his debt, and it is dishonoured, or the banker

Vigilantibus non dormientibus jura subveniunt.

fails, the creditor's remedies for the recovery of the debt are unaffected, if he has presented it in due time. (Byles, 23; see supra, par. 809, 810.) **856.**

Payment to one executor, trustee, or joint creditor.

Payment to one of two or more executors, trustees, or joint creditors, is sufficient. (Chit. Con. 658; Ad. Con. 983–4, 1046.) **857.**

Satisfaction

The taking from the debtor himself, and not from a third person with the debtor's assent, a smaller sum of money in lieu and full discharge of a greater ascertained sum, does not amount to a legal satisfaction, unless the time, place, or manner of payment of the less amount may by possibility be more advantageous to the creditor, or there is some other consideration to save the transaction from being a nudum pactum, or unless the acknowledgment of satisfaction is by deed. So that although a man may give, in satisfaction of a debt of 100*l.*, a horse worth 5*l.*, yet if he gives 5*l.*, it is not a satisfaction. (3 Ste. Com. 353; Broom Com. 422–3; Selw. 135–6; Chit. Con. 659, 660; 2 Sm. L. C. 290, 291, 295, 296–8; Rosc. 443; Ad. Con. 974–980; Byles, 215, 216.) **858.**

See 48 Vic. Cap. 13. Sec. 6.

Presumption of payment.

The payment of money will sometimes be presumed, from lapse of time and other circumstances, independently of the Statute of Limitations. (Chit. Con. 660.) **859.**

Proof of payment or non-payment.

Although a receipt was given, the debtor may prove payment by oral testimony; or the creditor may prove that in reality no payment was made. (Trower, 212; Chit. Con. 669.) **860.**

Receipts.

Receipts for 2*l.* and upwards now require a penny stamp, and no more. The stamp cannot be added after they have been written, except within fourteen days on payment of the duty and 5*l.*, or one calendar month on payment of the duty and 10*l.* (Sm. Merc. Law, 552; Trower, 212; Chit. Con. 670; 23 Geo. III. c. 49, s. 14; 55 Geo. III. c. 55, s. 11; 16 & 17 Vict. c. 59.) **861.**

The debtor is bound to provide the paper and writing materials, and the stamp, if necessary, for the receipt. (Ad. Con. 1046.) But the creditor is bound to pay him for the stamp. **862.**

Connected accounts.

In the case of connected accounts of debts and credits, the balance only is recoverable, whether at Law or in Equity. (Sm. Eq. Manual, 13th ed. par. 660.) **863.**

Appropriation of payments.

Where a creditor has two debts due to him from the same debtor on distinct accounts, the general law as to the appropriation of payments made by the debtor is this: the debtor is entitled to apply the payments, at the time of making them, in such manner as

he thinks fit. In default of appropriation by the debtor, whether evidenced (as it may be) by his previous conduct, or subsequent declarations, or by other circumstances, the creditor is entitled to determine the application of the sums paid. And if neither does so, the law implies an appropriation of such payments to the earlier debt. And where separate matters are treated as one entire account by all parties, the payment is deemed to be made in discharge of the earlier items of debt. (*Merriman* v. *Ward*, 1 John. & Hem. 376; Story's Eq. Jur. § 459*a*, 459*g*; Trower, 212; Rosc. 471–2; Tudor Ca. on M. L. 17, 20, 23–4; Chit. Con. 665–8; Ad. Con. 985, 987; *Hooper* v. *Keay*, L. R. 1 Q. B. D. 178.) **864.**

Frauds on creditors, parties to composition deed.

If a debtor induces a creditor to execute a deed of composition, by a gift, or by misrepresentation or concealment of the state of his affairs, the deed is void. And any secret agreement for securing to one of the creditors who are parties to a composition deed, any advantage not enjoyed by the rest, is fraudulent and void. (Ad. Con. 908–9; *Atkinson* v. *Denby*, 7 Hurl. & Norm. 934; *Dauglish* v. *Tennent*, L. R. 2 Q. B. 49.) **865.**

Guaranty.

A guaranty is a promise to be responsible for the payment of a debt or the performance

of a duty, in case another person, who is, or is supposed to be, primarily liable to such payment or performance, fails to pay or perform the same. (Wharton; Sm. Merc. Law, 463; 2 Ste. Com. 103; Rosc. 329; Chit. Con. 456; Ad. Con. 564–5; *Mountstephen* v. *Lakeman*, L. R. 5 Q. B. 613; 7 Q. B. (Ex. Ch.) 196; 7 H. L. 17.) **866.**

Care must be taken not to treat as a guaranty (which is an actual promise) a mere proposal or offer of a guaranty, acceptance of which requires to be notified to the maker, before it constitutes a binding contract. (Ad. Con. 7th ed. 853.) **867.**

It is not necessary that the person so primarily liable should have requested the person giving the guaranty to become answerable, or should be in any manner a party to it. (Chit. Con. 463; *Heffield* v. *Meadows*, L. R. 4 C. P. 595, 599.) **868.**

One person inducing a tradesman to supply goods to another person.

Where A. has induced a tradesman to deliver goods to B., the question frequently arises, whether the goods were actually sold to A., though delivered to B., or whether they were sold to B., and A. only became surety for the price. And so where A. has induced a person to do work for B., the question often occurs, whether the work is to be debited to A. though done for B., or

whether it was to be debited to B., and A. only became surety for B. And this is to be determined, not simply by a regard to the words of the guaranty, but from the character and situation of the parties and all the circumstances. Thus the words "I will see you paid;" may mean either, "I will pay you;" or "you shall be paid by the principal debtor, and if he does not pay you, I will be surety for the payment." (Sm. Merc. Law, 468; Rosc. 329–330; Chit. Con. 464; Ad. Con. 565; *Mountstephen* v. *Lakeman*, L. R. 5 Q. B. 613; 7 Q. B. (Ex. Ch.) 196; 7 H. L. 17.) **869.**

Enactments of the Statute of Frauds as to guaranties.

In consequence of the 4th section of the Statute of Frauds, 29 Car. II. c. 3, no action can be brought to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, unless the agreement upon which such action is brought, or some memorandum or note thereof (including the names of the parties) is in writing, signed by the party to be charged therewith, or some other person lawfully authorised by him. (Sm. Merc. Law, 463; 2 Ste. Com. 103; Ad. Con. 53, 565; *Williams* v. *Lake*, 2 Ell. & Ell. 349.) The writing, however, is only necessary by way of proof of the contract, not to

constitute it. (Sm. Merc. Law, 472; 1 Sm. L. C. 272.) And the statute does not apply where an order for goods is given by, and credit given to, one person for the use of another; for the debt in that case is the debt of the person giving the order. The statute only applies to promises to answer for the debt, default, or miscarriage of another, for which that other person himself is liable, whether such promises are made before or after the debt, default, or miscarriage. And hence, if A. says, "Let B. have these articles, and if he do not pay, I will," the statute applies; so that a writing is required. But if A. had said, "Let B. have these articles on my account," or "Let B. have these articles, and charge me with them," no writing would be required; because B. would not be liable at all, inasmuch as the articles were in fact purchased by A., though delivered by his direction to B. (Sm. Con. 84–5; Broom Com. 382; Chit. Con. 463, 466: Ad. Con. 54–5, 564–5.)

870.

The statute does not apply to a case where the result of a promise by one person to pay the debt or perform the duty of another, is to extinguish or satisfy the liability of such other person, by sub-

Ca. Sa. = Capias ad satisfaciendum -

stituting the former in his stead; as if A. agree to pay B.'s debt to C., if C. will discharge B. from arrest under a ca. sa. (Rosc. 330; Chit. Con. 468–9; Ad. Con. 55–6.) **871.**

The statute does not apply to promises not made to the person to whom the original debtor is liable; so that, if made to the debtor or to a third person, the promise need not be in writing. (Sm. Con. 89; Broom Com. 383; 1 Sm. L. C. 264; Chit. Con. 469.) **872.**

But the statute applies to promises to answer for another's default or miscarriage, though it be a tort unconnected with breach of contract. (Broom Com. 384; Ad. Con. 54.) **873.**

Consideration for a guaranty.

In consequence of the statute 19 & 20 Vict. c. 97, s. 3, it is no longer necessary that the consideration for a guaranty should appear in or by inference from a written document. (Sm. Con. 89, 90; Broom Com. 381; 2 Ste. Com. 103–4; Chit. Con. 470; Ad. Con. 61, 565.) **874.**

But if required by the opposite party, the person asserting a claim under a guaranty must show a good legal consideration for it. The antecedent existence of a debt, default, or miscarriage, in respect of which the

guaranty is given, does not of itself constitute such a consideration. But it need not be shown that there was an adequate consideration. (Sm. Merc. Law, 470; Ad. Con. 567; Chit. Con. 457.) As to what constitutes a consideration, see supra, par. 174–7. **875.**

It is sometimes doubtful whether a written guaranty is limited or unlimited as to time or amount, or whether a written guaranty to a certain amount is limited to secure that amount on one transaction, or whether it is a continuing guaranty to that amount from time to time. In such cases, parol evidence of the circumstances is admissible to fill up that on which the guaranty is silent, by ascertaining what was the scope and object of the intended guaranty. (*Coles* v. *Pack*, L. R. 5 C. P. 65; *Heffield* v. *Meadows*, L. R. 4 C. P. 595.) **876.**

Extent of liability.

Where a contract of suretyship is under seal, and the duration of the liability is not limited, the surety has no means of escape from the contingent liability, unless he has reserved to himself such a power; and, therefore, doubtful contracts of suretyship under seal, which the surety has no means of revoking, are construed in favour of the surety, so as to narrow rather than enlarge his lia-

bility. But in the case of a surety by simple contract, though of course the surety is liable for all advances or supplies made on the faith of his promise while it remains unrevoked, yet he may at any time revoke such promise and discharge himself from future liability, by giving notice to that effect. (Ad. Con. 570–1, 574; Chit. Con. 475–7.) **877.**

Misrepresentation practised on a surety.

Entire good faith is required between a debtor, creditor, and sureties. And if the surety or person giving the guaranty is misled, to the knowledge of the person receiving it, by a material misrepresentation or concealment of the terms of the contract, or of circumstances which the creditor ought to have disclosed, the suretyship or guaranty is ineffectual. (2 Ste. Com. 104; Ad. Con. 581; Chit. Con. 478; *Lee* v. *Jones*, 14 C. B. (N. S.) 386; 17 C. B. (N. S.) 482.) **878.**

Discharge of a surety.

A surety or person giving a guaranty is discharged—1. If the principal debtor or co-surety is released by the creditor, unless the surety has expressly agreed that a release of the principal debtor shall not have the effect of discharging the surety; or unless the liability of the surety has accrued, and the remedies against him are reserved.

2. If the debt or demand is otherwise extinguished, as between the principal parties. 3. If the remedy is suspended by a binding contract between them, without the surety's consent. 4. If the loss is attributable to some fault, other than forbearance, on the part of the creditor. 5. If the terms of the original agreement between the creditor and the principal debtor are altered by them without the surety's assent, and in a way that may prejudice him; at least if he entered into the contract with any knowledge of the terms of the original agreement affected by the alteration. 6. If the creditor is chargeable with any improper act or omission injurious to the surety. (2 Ste. Com. 104; Byles, 227–234; Ad. Con. 576–581; Burge, 163; Chit. Con. 478–480, 483; Rosc. 331. And see *Lawrence* v. *Walmsley*, 12 C. B. (N. S.) 799, 811; *Greenough* v. *McClelland*, 2 Ell. & Ell. 424, 429; *Bailey* v. *Edwards*, 4 Best & Sm. 761; *Union Bank of Manchester* v. *Beech*, 3 Hurl. & Colt. 672; *Harrison* v. *Seymour*, L. R. 1 C. P. 518; *Wulff* v. *Jay*, L. R. 7 Q. B. 756; *Sanderson* v. *Aston*, L. R. 8 Ex. 73; *Liquidators of Overend & Co.* v. *Liquidators of Oriental Financial Corporation*, L. R. 7 H. L. 348; *Swire* v. *Redman*, L. R. 1 Q. B. D.

541; *Polak* v. *Everett*, L. R. 1 Q. B. D. (Ap.) 669; *The Croydon Gas Company* v. *Dickinson*, L. R. 1 C. P. D. 707; 2 C. P. D. (Ap.) 46.) **879.**

If the creditor accepts payment from the principal in good faith, but it is afterwards set aside as a fraudulent preference, it does not discharge the surety. (*Petty* v. *Cooke*, L. R. 6 Q. B. 790.) **880.**

The mere giving time, or even a verbal promise not to press or not to sue, without any binding contract with the principal debtor not to do so, will not discharge those who stand in the position of sureties. (Ad. Con. 577; Chit. Con. 482–4; Byles, 228, 233; *Black* v. *Ottoman Bank*, 15 Moore P. C. 472.) And it has been repeatedly held (but contrary to principle, as the writer submits) that a contract to give further time does not discharge the surety, if it is agreed between the creditor and the principal debtor, when further time is given, that the surety shall not thereby be discharged. (*Boaler* v. *Mayor*, 19 C. B. (N. S.) 76.) And a creditor who has two principal debtors may bind himself to one of them (in any way short of an absolute release) to give him time, or even not to sue him, without prejudicing his right of

recourse against the other. (*Swire* v. *Redman*, L. R. 1 Q. B. D. 536, 541.) **881.**

On a continuing guaranty for a person employed, if the employer discovers that the person employed has been guilty of dishonesty or breach of duty, in the course of the service, and, instead of discharging him, continues to employ him, without the surety being aware of the dishonesty or breach of duty, and consenting, expressly, or impliedly, to the person employed being so retained, the employer cannot afterwards have recourse to the surety in respect of any dishonesty or breach of duty, during the subsequent service. (*Phillips* v. *Foxall*, L. R. 7 Q. B. 666; *Sanderson* v. *Aston*, L. R. 8 Ex. 73.) **882.**

Reimbursement of a surety.

The principal debtor is bound to reimburse the surety for any payment which he is compelled to make as surety. (2 Ste. Com. 156; Chit. Con. 485.) **883.**

Right of surety to discharge liability.

And indeed as soon as the principal makes default, the surety may discharge the liability, and compel the principal to reimburse him. (Ad. Con. 582, 585; Byles, 236.) **884.**

Discharge of debtor or surety.

If a debtor has obtained his discharge in bankruptcy, he is discharged from personal liability to his surety, as well as to the

creditor himself. But the creditor may still recover against the surety; and the creditor, or the surety (if the surety pay the debt), may prove against the debtor's estate under the bankruptcy. The surety is not discharged; because bankruptcy is the act of the law, and this is one of the very things the consequences of which the suretyship was intended, not to be relieved from, but to guard against, and provide for. **885.**

When a surety is released by the release of the debtor.

But if, by deed, there is an absolute release of the debt itself, or an absolute release of the principal debtor, without a reservation of the remedies against the surety capable of being construed as a qualification of the release of the debtor, the surety is discharged; because the debt is extinguished. So that if a creditor becomes a party to a composition deed releasing the debtor "in like manner as if he had obtained a discharge in bankruptcy," the creditor thereby releases the surety; because the creditor thereby voluntarily discharges the debtor from paying the debt which he might otherwise have paid. But it has been held (though improperly, as the writer submits) that the surety will not be so released, if by the deed the creditor expressly or impliedly stipulates with the

debtor that the surety shall not be released from his liability to the creditor; and, on the other hand, that the debtor shall not be released from his liability to the surety. In such case the release of the debtor will be construed, not as a release, but as a covenant not to sue him. The stipulation of the debtor that the surety shall not be released, is construed as involving a stipulation that he himself (the debtor) shall remain liable to the surety. (*Bateson* v. *Gosling*, L. R. 7 C. P. 9; *Cragoe* v. *Jones* (*a*), L. R. 8 Ex. 81.) **886.**

Contribution between sureties.

If one of two or more sureties, or other joint debtors, not being general partners, pays more than his proportion of the demand, he may, even at Law, compel a contribution from the other or others. (Chit. Con. 486; Byles, 8, 235; Ad. Con. 583–4; *Reynolds* v. *Wheeler*, 10 C. B. (N. S.) 561.)

None between tort-feasors.

But in general there is no right of contribution between tort-feasors, where damages have been recovered against one. (Chit. Con. 543.) **887.**

Right of surety to the creditor's securities.

By the statute 19 & 20 Vict. c. 97, s. 5, "Every person who, being surety for the

(*a*) In this case two Judges held that the surety was released by a composition deed, but the third Judge (with Mr. Baron Channell, who had ceased to be a member of the Court) held that the surety was not released.

debt or duty of another, or being liable with another for any debt or duty, shall pay such debt or perform such duty, shall be entitled to have assigned to him, or to a trustee for him, every judgment, specialty, or other security which shall be held by the creditor in respect of such debt or duty, whether such judgment, specialty, or other security shall or shall not be deemed at Law to have been satisfied by the payment of the debt or performance of the duty, and such person shall be entitled to stand in the place of the creditor." **888.**

Lord Tenterden's Act, as to representations or assurances.

An action lies for making a false representation of the character and solvency of another, whereby the plaintiff was induced to give credit to him, and has thereby suffered loss, if such representation was fraudulent, and not made bonâ fide under a belief of its truth. But no action can be brought to charge any person, by reason of any representation or assurance as to the character, conduct, credit, ability, trade or dealing of any other person, that he may obtain credit, money, or goods, unless it is in writing, signed by the party to be charged therewith, and not by his agent. (Sm. Merc. Law, 481; Rosc. 557; 9 Geo. IV. c. 14, s. 6; *Swift* v. *Jewsbury*, L. R. 9 Q. B. (Ex. Ch.) 301.) **889.**

R.S.O. 117. Sec. 9.

Set-off.

One ground of defence, either total or partial, is set-off. This is not a mere common law right to reduce or defeat a plaintiff's demand: it is a statutory right (*b*) of enforcing in the same action a cross claim for which a distinct action might have been maintained by the defendant against the plaintiff. (Chit. Con. 752–3.) Thus, if there are mutual debts between the plaintiff and defendant, or if either party is sued as executor or administrator, where there are mutual debts between the testator or intestate and the other party, one debt, if of definite amount, and in the same right, and recoverable by action by the party pleading it, may be set off against the other. Unliquidated damages or other unascertained amount cannot be set-off. (2 Geo. II. c. 22, s. 13; 8 Geo. II. c. 24, s. 4; Ad. Con. 988–994; Selw. 166–9; Rosc. 475, 477–8; Chit. Con. 752–764; *Alliance Bank* v. *Holford*, 16 C. B. (N. S.) 460; *Semenza* v. *Brinsley*, 18 C. B. (N. S.) 467; *Best* v. *Hill*, L. R. 8 C. P. 10.) And a

(*b*) It is not proposed to go into this subject, regarded as a matter of practice or procedure depending on Statutes or Orders; but simply to notice a few points relating to it, when viewed as a matter of Common Law Jurisprudence, before the Judicature Acts, by which the relative remedies of persons having counter-claims are materially affected.

set-off cannot be pleaded, unless an action could be maintained for the debt comprised in the set-off. And hence a debt for which an infant cannot be sued, cannot be pleaded as a set-off to a debt due to him, on which he is suing. (*Rawley* v. *Rawley*, L. R. 1 Q. B. D. (Ap.) 460.) **890.**

In an action by the payee of a joint and several promissory note against one who, to the knowledge of the payee, joined in it as a security only, the surety may plead by way of equitable defence a set-off due from the payee to the principal, arising out of the same transaction out of which the liability of the surety arose. (*Bechervaise* v. *Lewis*, L. R. 7 C. P. 372.) **891.**

Release.

A debt may be released either by the express act of the creditor, or by operation of law. No particular form of words is necessary to constitute a release. Thus, a covenant not to sue, without any limit as to time, is a release. (Chit. Con. 687–8.) **892.**

If the release is under seal, no consideration need be shown. If it is not under seal, it will be inoperative without a consideration, though it is in writing, and though the creditor accepts part of the debt expressly

in full of all demands. (Chit. Con. 687; Ad. Con. 974.) **893.**

A person cannot release all future causes of action that may arise. (Chit. Con. 689; Ad. Con. 921.) **894.**

A release by operation of law takes place in various cases: as where a creditor appoints his debtor to be his executor, who acts, and yet of course cannot sue himself; or where a creditor marries his or her debtor. (Chit. Con. 694; Ad. Con. 922.) **895.**

A release of a debt or of a claim to damages by one joint creditor is in law a release by both or all. (Chit. Con. 691.) **896.**

An unqualified release of one of two or more joint or joint and several debtors or contractors is a discharge of both or all. (Rosc. 474–5; Chit. Con. 691–3; Ad. Con. 920; Byles, 51, 229.) **897.**

More than one writ of fi. fa. at the same time against the same debtor.

Where more writs of fi. fa. than one, against the same debtor, are placed in the hands of the sheriff at the same time, by two or more creditors, there (unless there is a sum due for rent equal to the value of the goods, in which case, he may return nulla bona) he should levy under both or all the writs, and, when he has seized, he should give priority to each in the order in which they came into his hands. But if the goods are

not sufficient to satisfy more than the first writ or writs, he may return nulla bona to the subsequent writ or writs. (*Dennis* v. *Whetham*, L. R. 9 Q. B. 345.) **898.**

CHAPTER VIII.

SHIPOWNERS AND CHARTERERS (*a*).

Registration.

WITH the exception of certain small coasting vessels, ships must be registered, in order to have the privileges of British ships, *i.e.*, the right to assume the national flag and character, and the right to the protection that it affords. (Sm. Merc. Law, 182–3, 189; 2 Ste. Com. 249; 17 & 18 Vict. c. 104, ss. 19, 102; 31 & 32 Vict. c. 129.) **899.**

Shares in a ship, and number of registered shareholders.

The property of every British vessel is to be considered as divided into sixty-four equal parts or shares; and no person can be registered as owner in respect of a fractional part of a share or any proportion not being a sixty-fourth part. **900.**

No more than thirty-two individuals are entitled to register at the same time as legal

(*a*) The statute which consolidated the Acts relating to Merchant Shipping is the 17 & 18 Vict. c. 104. This was amended by the statute 18 & 19 Vict. c. 91; 25 & 26 Vict. c. 63; 30 & 31 Vict. c. 124; 31 & 32 Vict. c. 129; 32 & 33 Vict. c. 11; 34 & 35 Vict. c. 110; 35 & 36 Vict. c. 73; and 36 & 37 Vict. c. 85.

owners in severalty of distinct shares of a ship. But any number of persons, not exceeding five, may register as joint owners of the ship, or any share in her; and these joint owners, whether entitled by purchase or transmission, are to be considered as constituting one person in reckoning the number of persons entitled to be registered, and they cannot dispose in severalty of their respective proportions of their joint property. **901.**

Still, these rules do not affect the equitable or beneficial title of persons represented by or claiming through any registered owner; but no notice of a trust can be entered on the register. (Sm. Merc. Law, 191–2; 3 Ste. Com. 250; Mau. & Pol. 7, 8, 32; Ad. Con. 140–1; 17 & 18 Vict. c. 104, ss. 37, 43.) **902.**

Certificate of registry.

A certificate of registry embodying the registered particulars of the vessel, with an indorsement of the names of the owners and their shares, is the evidence of the ownership of a registered vessel. (Ad. Con. 141.) **903.**

Mode of transfer.

A registered ship or shares therein can only be transferred by bill of sale, in a prescribed form, under seal, executed in the presence of and attested by at least one

witness, and registered. The name of the transferee, as owner, must be registered, and the date and hour of the entry must be indorsed on the bill of sale. (Sm. Merc. Law, 193–6; Mau. & Pol. 20–22; Ad. Con. 141; 17 & 18 Vict. c. 104, ss. 55–57.) **904.**

Certificate of sale.

The registrar may grant to the owners of a ship a certificate of sale, authorising persons specified in it to dispose of it by sale out of the United Kingdom. (Sm. Merc. Law, 194; Mau. & Pol. 26; 17 & 18 Vict. c. 104, ss. 76–83.) **905.**

Mortgages.

A mortgage or transfer of a mortgage of a British ship or any share in her must be in a specified form, under seal, and attested and registered; and the date and hour of its entry must be indorsed upon it. **906.**

By the statute 25 & 26 Vict. c. 63, s. 3, "Equities may be enforced against owners and mortgagees of ships in respect of their interest therein, in the same manner as equities may be enforced against them in respect of any other personal property." **907.**

In case more than one mortgage of the same ship or share is registered, the mortgagees, notwithstanding any notice, have priority according to the date of registra-

tion. Every registered mortgagee may dispose of the ship or share mortgaged; but no subsequent mortgagee may do this without the concurrence of every prior registered mortgagee, except under the order of some competent Court. (Sm. Merc. Law, 195; Mau. & Pol. 33–5; 17 & 18 Vict. c. 104, ss. 66, 69, 71.) **908.**

Certificate of mortgage.

A certificate of mortgage may be granted by the registrar to the owners of a ship, allowing a mortgage out of the country where the ship is registered. And the mortgage, when made, is to be indorsed by a registrar or British consular officer, on the certificate of mortgage. (Sm. Merc. Law, 196; Mau. & Pol. 36; 17 & 18 Vict. c. 104, ss. 76–80.) **909.**

Transmission of mortgage.

The transmission of a mortgage, by death, bankruptcy, marriage, &c., must be registered. (Sm. Merc. Law, 196; Mau. & Pol. 35; 17 & 18 Vict. c. 104, ss. 73–75.) **910.**

Discharge mortgage.

When a mortgage is discharged, satisfaction is to be entered on the registry. (Sm. Merc. Law, 196; Mau. & Pol. 37; 17 & 18 Vict. c. 104, s. 68.) **911.**

Charter-party.

A charter-party is a contract by which an entire ship or principal part thereof is let to a merchant for the conveyance of goods therein by the shipowner, in consideration

of the payment of a sum of money. It is often, but not necessarily, a deed, and is executed by the owner of the ship, or the master, or some other agent of the owner. (Sm. Merc. Law, 299, 300; 2 Ste. Com. 137–8; Mau. & Pol. 204.) **912.**

Meaning of freight.

The sum paid for the hire of the ship is calculated at so much per ton or per month, and is called the freight; but that term is also used to denote the cargo. (2 Ste. Com. 137; Maclachlan, 381.) **913.**

Shipper, charterer, freighter, owner.

The merchant who ships the goods is called the shipper, charterer, or freighter, and the ship is said to be freighted by him. **914.**

The owner usually signifies the shipowner, not the owner of the goods. (Sm. Merc. Law, 326–7; 2 Ste. Com. 137.) **915.**

The charterer must offer a reasonable cargo of the kind specified in the charter; and the shipowner must provide a ship reasonably fit to carry out such a reasonable cargo. (*Stanton* v. *Richardson*, L. R. 7 C. P. 421, 435; 9 C. P. (Ex. Ch.) 390.) **916.**

Contract of affreightment.

Where the contract of affreightment does not provide otherwise, as between the parties to the contract, in respect of sea damage and its incidents, the law of the country to which the ship belongs must be taken to be the law

to which they have submitted themselves. (*Lloyd* v. *Guibert*, L. R. 1 Q. B. (Ex. Ch.) 115.) **917.**

Payments in advance on account of freight.

Payments made in advance on account of freight cannot be recovered back, although the vessel be lost. (*Byrne* v. *Schiller*, L. R. 6 Ex. (Ex. Ch.) 319.) **918.**

Demurrage.

The merchant usually covenants to load and unload within a specified number of days, which are called lay or running days, and to pay a daily sum for any longer time during which he may detain the ship. This sum, as well as the delay itself, is called demurrage; and it is payable even if the delay in loading or unloading was unavoidable, owing to the state of the weather, or some other cause over which the freighter had no control. (Sm. Merc. Law, 301; Mau. & Pol. 264–5; *Thiis* v. *Byers*, L. R. 1 Q. B. D. 244; *Porteus* v. *Watney*, L. R. 3 Q. B. D. (Ap.) 534; *Davies* v. *McVeagh*, L. R. 4 Ex. D. (Ap.) 265.) **919.**

Conveyance in a general ship.

A contract for conveyance in a general ship is a contract by which the master or owner of a ship engages with separate merchants, or with one merchant who sub-lets her to sub-freighters, to convey their goods to the place of her destination. In this case she is called a general ship; and no charter is usually

executed, but only a bill of lading, which is a document that specifies the ship and the goods shipped, and expresses that they shall be delivered at a certain place, in good order, on payment of a certain freight, with primage and average. (Sm. Merc. Law, 305, 307; 2 Ste. Com. 137; Mau. & Pol. 224–5; infra, par. 936.) **920.**

Bill of lading.

The usual course is for the master to give a receipt to the shipper on delivery of the goods on board, and afterwards to sign and deliver a bill of lading to the holder of the receipt, which is then returned to the master. And the merchant sends a copy or two copies of the bill of lading to the consignee, and retains one for his own use. But as between the shipper and the shipowner, it is not conclusive, unless signed by the shipowner. (Sm. Merc. Law, 306, 315; Mau. & Pol. 90; *Meyer* v. *Dresser*, 16 C. B. (N. S.) 646; Chit. Con. 8th ed. 6, n. (*d*); Ad. Con. 6th ed. 443; Rosc. 11th ed. 251; 18 & 19 Vict. c. 111, ss. 2, 3.) **921.**

The bill of lading is usually made out for delivery to a particular person or his assigns; but sometimes it is made out for delivery "to —— order or —— assigns." Primâ facie, especially when the consignor is an unpaid vendor, the latter form indicates that he

intends to reserve to himself the ownership of the goods, and the right of passing it by indorsing the bill of lading. (Sm. Merc. Law, 307–8.) **922.**

A bill of lading is a negotiable instrument: so that by an indorsement of it by the shipper or consignee, either to a particular person or in blank, accompanied by a delivery of it to the intended transferee, the property in the goods may be transferred, subject only to the right of an unpaid vendor to stop in transitu. And the indorsee may deprive the vendor of this right by indorsing the bill of lading for valuable consideration. For, though the consignee named in the bill of lading become insolvent without having paid for the goods, yet, if he assigns them for valuable consideration, and the assignee had no notice of the insolvency of the consignee, the ownership of the goods passes to the assignee. The shipper retains the power of transferring the property in the goods by an assignment of the bill of lading, so long as they are in the hands of any agent of his. And the indorsement is not irrevocable as soon as made; for he may change his purpose before the delivery of the goods or of the bill of lading to the person who is named in it. (Sm. Merc. Law, 309, 310; Mau. & Pol. 226, 262, 274;

Pease v. *Gloahec*, L. R. 1 P. C. 219; *Barber* v. *Meyerstein*, L. R. 4 H. L. 317.) **923.**

In taking a bill of lading, the vendor of the goods who ships them controls the possession of the captain, and makes him accountable to deliver the cargo according to its terms. It is the symbol of property, and the holder of it retains the property in himself. It is not inconsistent with a statement in the invoice that the goods are "shipped on account and at the risk" of the consignee. The jus disponendi is still reserved to the shipper through the medium of the bill of lading. **924.**

The burden of showing the existence of a different state of things lies on the person who contradicts what would be the ordinary legal conclusion from the transaction. **925.**

Where a bill of lading, and a bill of exchange to cover the goods included in the bill of lading, are sent in a letter to a vendee of the goods, it is a well understood rule that the bill of exchange must be accepted, or the bill of lading cannot be retained. **926.**

Where the bill of exchange is not accepted, but the bill of lading is retained, the bill of lading, acquired in that manner, gives no

right of property to the person so acquiring it. (*Shepherd* v. *Harrison*, L. R. 5 H. L. 116.) **927.**

All the rights and liabilities of a consignee or indorsee of a bill of lading pass from him to his indorsee. (*Smurthwaite* v. *Wilkins*, 11 C. B. (N. S.) 842.) **928.**

Set-off.

The freighter cannot set off, against the amount of freight due from him to the shipowner, the damage done to the cargo, or the value of the articles which, though mentioned in the bill of lading, were not put on board. (See *Dakin* v. *Oxley*, 15 C. B. (N. S.) 646; *Meyer* v. *Dresser*, 16 C. B. (N. S.) 646, 659.) **929.**

Power to hypothecate or sell the ship, freight or cargo.

The master may sell the ship, or a part or even the whole of the cargo, for the benefit of the owners, in cases of urgent necessity. (Mau. & Pol. 395–6; Tudor Ca. on M. L. 66–8; *Acatos* v. *Burns*, L. R. 3 Ex. D. (Ap.) 282.) **930.**

Where it is necessary to raise money for repairs, the master should endeavour to raise it on the credit of the owner; but if he cannot, he may hypothecate the ship or the freight; or in case he cannot raise the money in any other way, he may sell the ship or a part or the whole of the cargo. If he hypothecates the cargo, the shipowner must in-

demnify the merchant. If he sells it, the merchant, on the ship's safe arrival at the place of destination, may elect to receive what the goods would have fetched if brought thither, or to take the sum realised by them. (Sm. Merc. Law, 314, 421; Mau. & Pol. 395–7.) **931.**

The master ought to have the authority of the owners of the ship or cargo before he sells or hypothecates the ship or cargo, unless a sale or hypothecation is necessary before he can obtain such authority. (*The Bonita*, 1 Lush. 252; *The Olivier*, 1 Lush. 484; *The Australasian Steam Navigation Co.* v. *Morse*, L. R. 4 P. C. 222; *Cobequid Marine Insurance Co.* v. *Barteaux*, L. R. 6 P. C. 319; *Kleinwort, Cohen & Co.* v. *Cassa Marittima of Genoa*, L. R. 2 Ap. Cas. 156; *Acatos* v. *Burns*, L. R. 3 Ex. D. (Ap.) 282.) **932.**

Where goods damaged on the voyage are landed at an intermediate port and sold without the assent of their owner, though there was opportunity of communicating with him, the shipowners are not entitled to freight pro rata itineris. (*Acatos* v. *Burns*, L. R. 3 Ex. D. (Ap.) 282.) **932a.**

When the owner of a vessel has an opportunity of examining goods, no warranty, on

the part of the owner of the goods, can be implied that they are fit to be carried on the voyage. (*Acatos* v. *Burns*, L. R. 3 Ex. D. (Ap.) 282.) **932b.**

Implied warranty of seaworthiness.

In whatever way a contract for the conveyance of merchandise or goods is made, where there is no agreement to the contrary, the shipowner is, by the nature of the contract, impliedly and necessarily held to warrant that the ship is seaworthy; that is, in a condition to perform the voyage then about to be undertaken. Seaworthiness means that measure of fitness which the particular voyage or particular stage of the voyage requires; so that a vessel seaworthy for port, and even for loading in port, may be, without any breach of warranty, whilst in port, unseaworthy for the voyage, but if she put to sea in that state the warranty of seaworthiness for the voyage is broken. This implied warranty attaches when she sets sail with her cargo on board for her port of destination. And the warranty is broken if she is then unfit to encounter the perils of the voyage, although she may have been seaworthy whilst lying in the port of loading, and also at the time of starting from her anchorage for and arriving at the place of loading, and of commencing to take

her cargo on board. (*Kopitoff* v. *Wilson*, L. R. 1 Q. B. D. 377, 380; *Cohn* v. *Davidson*, L. R. 2 Q. B. D. 455; *Steel* v. *The State Line Steamship Co.*, L. R. 3 Ap. Cas. 72.)

933. Responsibility of shipowner.

A shipowner is not liable for any loss or damage, happening without his actual fault or privity, of any goods, by reason of fire, or of any gold, silver, diamonds, watches, or precious stones, by reason of any robbery or embezzlement, unless the owner or shipper has inserted in the bill of lading, or declared in writing to the master or shipowner, the nature and value of such articles. (Sm. Merc. Law, 319–320; Mau. & Pol. 48; 17 & 18 Vict. c. 104, s. 503.)

934. Nor are shipowners answerable in damages, in respect of loss of life or personal injury, either alone or together with loss or damage to ships, boats, goods, merchandise, or other things, to an aggregate amount exceeding fifteen pounds for each ton of their ship's tonnage; nor in respect of loss or damage to ships, goods, merchandise, or other things, whether there be in addition loss of life or personal injury or not, to an aggregate amount exceeding eight pounds for each ton of the ship's tonnage, where such loss or damage arises without their actual fault

or privity. (25 & 26 Vict. c. 63, s. 54.)

935.

Charges payable by merchant or consignee.

A merchant who has taken a ship to freight or the consignee must pay the charges due on his commodities. These are usually primage, average, demurrage, and freight. Primage is a small payment to the master for his trouble. Average denotes several petty charges, such as towage, beaconage, &c. Demurrage and freight have been already explained. (Sm. Merc. Law, 320–3; Mau. & Pol. 28; supra, par. 913, 919.)

936.

Salvage.

Salvage is a compensation to be made by the shipowner or merchant for some special assistance by which the ship or its lading has been saved from some impending peril, or recovered after actual loss. (Sm. Merc. Law, 334; Mau. & Pol. 420; *The Cleopatra*, L. R. 3 Prob. D. 145.)

937.

General average.

General average is a contribution which the law requires to be made by the several persons interested in a ship, freight, and cargo, to indemnify a person suffering a damage, loss, or expense, which was voluntarily and necessarily incurred for the purpose of, and conduced to, the saving the ship and cargo or a part of the property; as where goods are thrown overboard, or

masts are cut away, in order to lighten a ship, or expenses are incurred in warehousing or reloading goods for the purpose of making repairs, and for pilotage and other incidental charges. (*Atwood* v. *Sellar*, L. R. 5 Q. B. D. (Ap.) 286; Sm. Merc. Law, 331–2; 2 Ste. Com. 132; Mau. & Pol. 278–285; *Stewart* v. *West India and Pacific Steamship Co.*, L. R. 8 Q. B. 88; (Ex. Ch.) 362.) **938.**

The contribution to salvage or general average expenses does not depend on the policy of insurance, or on the principle of a quantum meruit, but on the general principle of the maritime law, whereby an extraordinary reward is given as a reward for great, and perhaps dangerous, exertions in successfully bringing in a ship. (*Aitchison* v. *Lohre*, L. R. 4 Ap. Cas. 755.) **938a.**

The practice is, to ascertain the proportion that the value of the property sacrificed bears to the entire value of the ship, cargo, and freight, and to make the property of each owner (including the property sacrificed) contribute to the common loss in that proportion. The adjustment of the average is usually made by brokers, and the amount is paid by the insurers of the different parties chargeable. (2 Ste. Com. 133; Sm. Merc. Law, 332; Mau. & Pol. 286.) **939.**

Bottomry and respondentia.

Bottomry (so called, because it is in the nature of a mortgage of the bottom or keel of a ship, a part for the whole) is an agreement entered into by the owner of a ship or his agent, whereby, in consideration of a loan for the use of the ship, the borrower undertakes to repay the loan, with interest, in the event of the ship terminating her voyage safely, and binds or hypothecates the ship, freight, or cargo, or all of them, for the performance of his contract. This agreement is usually in the form of a bond, called a bottomry bond, but sometimes in the shape of a deed poll, and is then called a bottomry bill. If the ship returns, the same, as well as the owner personally, becomes answerable for the money lent; but if the ship is lost, the lender loses his money. (Sm. Merc. Law, 419; 2 Ste. Com. 91; Mau. & Pol. 385.) **940.**

Where the loan was not on the vessel, but on the cargo, it used to be called respondentia, because, in that case, only the borrower personally is bound to answer the contract. Such person is said to take up money at respondentia. (Sm. Merc. Law, 419; 2 Ste. Com. 91; Mau. & Pol. 385.) **941.**

But the term respondentia is now seldom used; the term bottomry being employed,

even where the cargo alone is the security. The terms bottomry and respondentia are also applied to contracts for the repayment of money borrowed on the mere hazard of the voyage. (2 Ste. Com. 91; Mau. & Pol. 385; Maclachlan, 46.) **942.**

Interest.

The lender's principal being at hazard during the voyage, he was entitled to stipulate for any amount of interest whatever, even when the usury laws were in force. (Sm. Merc. Law, 420; Mau. & Pol. 392.) **943.**

Effect of hypothecation.

Although a bottomry bond or bill purports to assign the ship, freight, or goods, the effect of it is not to give the creditor a property in that which is so assigned, but to give him a claim upon it, enforceable by legal process. (Sm. Merc. Law, 422; Mau. & Pol. 392.) **944.**

Order of payment of loans.

If securities of this kind are given at different periods of the voyage, and the value of the property is insufficient to discharge them all, the last in point of date is entitled to priority of payment, if the master was unable to obtain the necessary supplies on the personal credit of himself or his employers; because without the last loan, the former lenders might have entirely lost their security. (Sm. Merc. Law, 424; Abbott, 133.) **945.**

CHAPTER IX.

INSURERS AND INSURED.

I. *Insurance generally.*

Definition of insurance.

INSURANCE is a contract by which a person, company, or society, in consideration of a gross sum or of a periodical payment, undertakes to pay a larger sum on the happening of a particular event. **946.**

Explanation of the terms in use.

The consideration is termed the premium or premiums; the party entering into the undertaking, the assurer or insurer; the party for whose benefit it is entered into, the assured or insured; the happening of the event, the risk; and the instrument containing the contract, the policy. The interest which it is necessary for a person to have before he can effect an available insurance on his own account and for his own benefit, is called an insurable interest; and the interest of the assured is said to be covered by the policy, when the amount payable under the policy would fully compensate him for any loss his interest may sustain. (See Sm.

Merc. Law, 339; 2 Ste. Com. 125; Bunyon, 1, 6, 9; Arnould, 2, 3.) **947.**

Necessity for the strictest good faith.

The law requires the strictest good faith on the part of everyone who effects an insurance of any kind; so that the contract will be void, if the insured has been guilty of fraud, or misrepresentation of any material circumstance, or concealment of any material fact which lies within his private knowledge, though no loss may have arisen therefrom. (Sm. Merc. Law, 396, 399, 412.) **948.**

Return of premium.

Where a policy is void ab initio, but the insured has not been guilty of fraud or breach of the law, the premium must be returned. (2 Ste. Com. 156; Sm. Merc. Law, 403.) **949.**

Ordinary species of insurance.

The most ordinary species of insurance are life insurance, fire insurance, and marine or maritime insurance. **950.**

II. *Life Insurance.*

Life insurance defined.

Life insurance is a contract by which the insurer, in consideration of a gross sum or an annual payment, agrees to pay the person for whose benefit the insurance is effected, or his executors, administrators, or assigns, a certain sum of money or annuity, on the death of the person whose life is insured, whenever it happens, if the insurance is for

the whole life, or in the event of the death happening within a certain period, if the insurance is only for that period. (Sm. Merc. Law, 406; Bunyon, 1, 5.) **951.**

On what lives an insurance may be effected.

A person may effect an insurance upon his own life, or on the life of another in which he (the person insuring) has a pecuniary interest; but no insurance may be effected on a life in which the person for whose benefit or on whose account such insurance is made has no pecuniary interest, or by way of gaming or wagering; and such person's name must be inserted in the policy; and no greater sum may be received from the insurer or insurers than the value of the interest of the insured in such life. (Sm. Merc. Law, 406–7; 2 Ste. Com. 134–5; Bunyon, 14, 19–21; Ad. Con. 557; 14 Geo. III. c. 48, ss. 1–3; *Hebdon* v. *West*, 3 Best & Sm. 579; *Evans* v. *Bignold*, L. R. 4 Q. B. 622.) **952.**

A wife has an insurable interest in the life of her husband; but a husband, parent, or child has not such an interest in the life of his wife, child, or parent, unless he has an interest in property dependent on the life of his wife, child, or parent. (Bunyon, 14–16.) **953.**

A trustee may insure in respect of his trust, and for the benefit of his trust estate.

And a creditor may insure the life of his debtor. (Sm. Merc. Law, 407–8; Bunyon, 19, 20; Ad. Con. 557.) **954.**

Insurance with different insurers.

If for greater security anyone thinks fit to insure with different insurers by different contracts, and to pay the premium on each policy, he is at liberty to do so; but he can only recover in the whole the amount of his insurable interest; and if he has received the whole amount from one insurer, he is precluded from recovering any more from the others. (*Hebdon* v. *West*, 3 Best & Sm. 579.) **955.**

Declaration

It is usual for the person whose life is insured to subscribe a declaration concerning his age, health, and other circumstances, which is generally, either expressly or by reference, embodied in the policy, and the correctness of which is a condition precedent to the responsibility of the insurers. But a warranty that the insured is in good health, means in reasonable good health, not that he is perfectly free from illness. (Sm. Merc. Law, 409; Bunyon, 31; Ad. Con. 558.) **956.**

Fraud, misrepresentation, or concealment.

Fraud, misrepresentation, or non-communication of material circumstances by the insured or his agent when the policy is effected, renders it void. (Ad. Con. 558–9;

see *Perrins* v. *Marine, &c., Insurance Society*, 2 Ell. & Ell. 317; *Macdonald* v. *Law Union Insurance Co.*, L. R. 9 Q. B. 328; *Ionides* v. *Pender*, L. R. 9 Q. B. 531.) **957.**

Proviso.

A proviso is ordinarily inserted, declaring the policy to be void, in case the insured should die upon the seas, except in certain cases, or should go beyond Europe without leave, or (where a man insures his own life) should commit suicide or be executed for any crime, or if the age of the insured exceeds years, or if he has disease tending to shorten life, or if the declaration contains any untrue account. But this is generally expressed to be subject to the exception, that the policy shall remain in force so far as it regards any bonâ fide interest acquired in it by a third person. (Sm. Merc. Law, 409, 411; Bunyon, 67–8, 78.) **958.**

Default in payment of premium.

In case of non-payment of the premium in the stipulated manner, the policy will be void, and will not be revived by a subsequent receipt of the premium, though the company may not have been at all damnified. Nor will it be an available excuse that the assured received no notice reminding him of the day for paying the premium; for such a renewal notice, as it is termed, though customary, is not required by law. **959.**

Days of grace.

By the conditions, a certain number of days after the day named for payment, called days of grace, are frequently allowed for the payment; but these cannot be depended upon if the life should drop after that day and before payment. (Sm. Merc. Law, 411; Bunyon, 65–6; Ad. Con. 560.) **960.**

Assignment of policy.

A policy of insurance, being a chose in action, was not assignable at Law, so as to enable the assignee to sue at Law in his own name; but the assignment was valid in Equity, and enabled the assignee to sue at Law in the name of the assignor, in whom the legal interest still remained after the assignment. (Ad. Con. 562.) Now, however, the assignee may sue in his own name. (30 & 31 Vict. c. 144, s. 1. And see supra, par. 230.) **961.**

A life policy not a contract of indemnity.

A policy of life insurance is not a contract of indemnity; and hence a person may claim the benefit of the policy, even though he may have sustained no loss by the occurrence of the event upon which the money becomes payable. So that if a creditor insures the life of his debtor to the extent of his debt, the creditor may recover the money insured, though the executors of the debtor may have paid the debt. (Ad. Con. 563; Rosc. 321.) **962.**

III. *Fire Insurance.*

Fire insurance defined.

An insurance against fire is one by which the insurer, in consideration of a payment in gross or at stated intervals, agrees to indemnify the assured for a certain time against damage to his property by fire. **963.**

Interest of the insured.

The insured must have some kind of pecuniary interest in the property or of accountability for its safety; and he can only recover to the extent of that interest. And the assurance is not assignable without the insurer's consent. (Sm. Merc. Law, 414; 2 Ste. Com. 133-4; Ad. Con. 450; 14 Geo. III. c. 48, s. 1.) **964.**

A warehouseman, wharfinger, common carrier, or bailer of goods may keep up a floating policy for the insurance of the goods of his customers; but the money will belong to them, and may be recovered from him, when received by him. (Ad. Con. 555.) **965.**

Different kinds of risks.

Risks are usually divided into three: 1st, common insurance; 2nd, hazardous; 3rd, doubly hazardous. But there are also extraordinary risks, which are the subject of special agreement. (Sm. Merc. Law, 415.) **966.**

Negligence.

A loss by mere negligence, without fraud, is covered by the policy. (Sm. Merc. Law, 417; Ad. Con. 553.) **967.**

Increase of the risk by altering the property.

If the insured alters the premises in such a way as to increase the risk, he thereby forfeits the policy. (Ad. Con. 551.) **968.**

Unusual risk.

If the insured does not disclose to the insurer any unusual risk existing at the time of the policy, this will deprive the insured of all right of action on the policy. (Ad. Con. 552.) **969.**

Days of grace.

A mere proviso or condition giving a certain number of days of grace for the payment of the premium will not protect the insured, in case a loss by fire happens within those days, but before the premium is paid. There should be an express stipulation that the insurance shall continue, and the property be covered by the policy, until the expiration of the days of grace. (Ad. Con. 554.) **970.**

Power of obliging the insurance money to be laid out in repairs.

To deter persons from setting their own premises on fire in order to obtain the sum for which they are insured, the insurance office may, at the request of any person interested in a building within the bills of mortality burnt down or damaged, or upon any suspicion of fraud, cause the insurance money to be expended in repairs, unless the

party insured, within sixty days after adjustment of the claim, gives security that the money shall be expended, or the money at that time is disposed of, to the satisfaction of all parties. (Sm. Merc. Law, 417–418; 14 Geo. III. c. 78.) **971.**

Recovery of compensation from a wrong-doer, and also from an insurer.

A fire policy is a contract of indemnity; and hence, if a person has, under an insurance, received a full compensation for his loss by fire, and has afterwards recovered compensation in an action for damages against the person who caused the mischief, he is bound to hand over the damages to the insurer, who, in such case, is the party really damnified. And on the other hand, if he proceeds in the first instance against the wrong-doer, and recovers full compensation from him, he cannot then sue on the policy. (Ad. Torts, 265; Ad. Con. 555.) **972.**

IV. *Marine Insurance.*

Marine insurance defined.

Marine insurance is a contract by which one party, for a stipulated sum, agrees to indemnify another against loss of a ship, or the goods, or the freight, or the profits expected from the cargo, or of all or any of them, during a certain voyage or a certain period. **973.**

Underwriters.

Such insurances are usually undertaken by several persons, who are called underwriters, from their subscribing the policy, and each engaging thereby, on his own separate account, to indemnify to the extent of a certain sum set opposite his name, as subscribed or underwritten at the foot of the policy. (Arnould, 2, 34; 2 Ste. Com. 127; Sm. Merc. Law, 340.) **974.**

Brokers.

Almost all policies are effected by insurance brokers, or, as they are frequently called, policy brokers, who act as middlemen between the merchants and shipowners and the private underwriters or public insurance companies. (Arnould, 117.) **975.**

Premium.

According to the ordinary course, the assured does not pay the premium to the broker, and the broker does not pay it to the underwriter, in the first instance. But, as between the assured and the underwriter, the premiums are considered as paid at once. The underwriter, however, looks to the broker, and he looks to the assured for actual payment of the premium, on the settlement of accounts between them respectively. (Sm. Merc. Law, 342; Arnould, 118, 121.) **976.**

A policy of marine assurance is not a

contract of mere indemnity. (*Aitchison* v. *Lohre*, L. R. 4 Ap. Cas. 755.) **976a.**

Open or valued policy.

A policy is either open or valued. An open policy is one in which the value of the subject insured is not specified in the policy, but is left to be estimated in case of loss. A valued policy is one in which the value of the subject insured is settled by agreement, and specified in the policy. (Sm. Merc. Law, 347; Arnould, 14.) And the value so specified is, in the absence of fraud, conclusive between the parties, however largely in excess of the true value. (*Barker* v. *Janson*, L. R. 3 C. P. 303.) **977.**

Wager policy.

A wager policy is one which shows, on the face of it, that the contract is not a real insurance, but a wager; that it is, in fact, a pretended insurance, founded on an ideal risk. (Arnould, 13.) **978.**

Interest of the insured.

No insurance may be made on an English ship (except one fitted out solely to cruise against the Queen's enemies) or on any goods on board an English ship, "interest or no interest," *i.e.*, without the necessity of the insurer having an interest therein, or without the benefit of salvage to the insurer. (Sm. Merc. Law, 342–3; 2 Ste. Com. 135; Arnould, 330–7; 19 Geo. II. c. 37, ss. 1, 2.) **979.**

In order to have an insurable interest, it is sufficient to have a right of such a nature that the insurer may be benefited by the preservation of the thing insured, and prejudiced by its destruction. (Arnould, 281; 19 Geo. II. c. 37, s. 4; *Wilson* v. *Jones*, L. R. 2 Ex. (Ex. Ch.) 139; *Barber* v. *Fleming*, L. R. 5 Q. B. 59.) **980.**

Overvaluing an interest.

If the insured fraudulently overvalues his interest, he cannot recover even for the value proved to be on board. (Sm. Merc. Law, 348; Arnould, 362.) **981.**

Reassurance.

An underwriter may not secure himself by effecting a reassurance, that is, an insurance on that which he has insured, except in case of bankruptcy or death of the insurer; in which case a reassurance is allowed, if in the policy it purports to be such, and does not exceed the sum before insured. (Sm. Merc. Law, 345; 2 Ste. Com. 128; Arnould, 339–342; 19 Geo. II. c. 37, s. 4.) **982.**

Double insurance.

A person who is insured by one set of underwriters may effect another insurance on the same subject with another set of underwriters, even though he may have been fully insured by the first set. But he cannot recover more than the amount of his loss. If he obtains the full amount of his loss on either policy, the underwriters upon

that policy are entitled to a contribution from the underwriters upon the other. (2 Ste. Com. 128; Arnould, 345–6.) And in an action on a policy, the assured is only entitled to recover the amount agreed upon in that policy, after deducting what (if anything) he has received on other policies effected on the same subject-matter. (*Bruce* v. *Jones*, 1 Hurl. & Colt. 769.) **983.**

Form of policy.

The form of the policy in use was introduced into England by the Lombards, and is very inaccurate and ungrammatical in its language. It is usually printed with blanks, for the insertion of necessary particulars, as the intention of the parties happen to require. (Sm. Merc. Law, 346; Arnould, 16.) **984.**

In order to render intelligible the remarks which follow, it will be convenient to subjoin the common printed form of a Private Underwriter's (Lloyd's) Policy on Ship and Goods:—

"In the name of God. Amen.

"A. B., as well in his own name as for and in the name and names of all and every other person or persons to whom the same doth, may, or shall appertain, in part or in all, doth make assurance and cause himself and them, and every of them, to be insured,

lost or not lost, at and from —— to any —— upon any kind of goods or merchandises, and also upon the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture of and in the good ship or vessel called the ——, whereof is master under God, for the present voyage, E. T., or whosoever else shall go for master in the same ship, or by whatsoever other name or names the same ship, or the master thereof, is or shall be named or called; beginning the adventure upon the said goods and merchandises from the loading thereof aboard the said ship, —— upon the said ship, &c. —— and so shall continue and endure during her abode there, upon the said ship, &c., and further until the said ship, with all her ordnance, tackle, apparel, &c., and goods and merchandises whatsoever, shall be arrived at —— upon the said ship, &c., until she hath moored at anchor twenty-four hours in good safety, and upon the goods and merchandises until the same be there discharged and safely landed And it shall be lawful for the said ship, &c., in this voyage, to proceed, sail to, and touch and stay at any ports or places whatsover, without prejudice to this insurance. The said ship and goods and merchandises, &c., for so

much as concerns the assureds by agreement between the assureds and assurers in this policy, are and shall be valued at ——. Touching the adventures and perils which we, the assurers, are contented to bear, and do take upon us in this voyage, they are of the seas, men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and counter-mart, surprisals, takings at sea, arrests, restraints, and detainment of all kings, princes, and people, of what nation, condition, or quality soever, barratry of the masters and mariners, and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment or damage of the said goods and merchandises, or ship, &c., or any part thereof. And in case of any loss or misfortune, it shall be lawful to the assureds, their factors, servants, and assigns, to sue, labour, and travel for, in, and about the defence, safeguard, and recovery of the said goods and merchandises, or ship, &c., or any part thereof, without prejudice to this insurance; to the charges whereof we, the assurers, will contribute each one according to the rate and quantity of his sum herein assured. And it is agreed by us, the insurers, that this writing or policy of assurance, shall be of as much force and effect as

the surest writing or policy of assurance heretofore made in Lombard Street, or in the Royal Exchange, or elsewhere in London. And so we, the assurers, are contented, and do hereby promise and bind ourselves, each one for his own part, our heirs, executors, and goods, to the assureds, their executors, administrators, and assigns, for the true performance of the premises, confessing ourselves paid the consideration due unto us for the assurance by the assured ——, at and after the rate of ——.

"In witness whereof, we, the assurers, have subscribed our names and sums assured in London. **985.**

The Memorandum.

"N.B.—Corn, fish, salt, fruit, flour, and seed are warranted free from average, unless general, or the ship be stranded. Sugar, tobacco, hemp, flax, hides, and skins are warranted free of average under 5*l.* per cent. And all other goods, the ship and freight, are warranted free of average under 3*l.* per cent., unless general, or the ship be stranded." (Sm. Merc. Law, 348; Arnould, 17.) **[986.]**

Time policy.

A time policy is a policy by which a ship is insured for a certain period of time, instead of for a certain voyage. Such an insurance is effected in consequence of the ship being

intended to be employed in adventures, which, from their nature, it would be inconvenient or even impossible to designate by local termini. (Arnould, 462.) **987.**

"Lost or not lost."

The words "lost or not lost" render the underwriter liable, although the ship be lost at the time of insurance, unless the loss were known only to the insured. Sometimes, however, these words are restrained by warranting the ship to be "well" on a particular day. (Sm. Merc. Law, 357–8; Arnould, 21.) **988.**

Jettison.

Jettison is a throwing of goods overboard, for the purpose of saving the ship. (Sm. Merc. Law, 361; 2 Ste. Com. 129; Arnould, 904.) **989.**

"People."

The word "people" signifies the governing power of a country. (Sm. Merc. Law, 361; Arnould, 836.) **990.**

Arrest.

Arrest is a temporary detention, for a state purpose, of a ship and goods, by the government of the country to which it belongs, or some other friendly power, not with the object of prize (for then it would be a capture), but with a design to restore the ship and goods, or to pay for them. (Arnould, 836.) **991.**

Embargo.

The most usual species of arrest or detainment is an embargo, which is a prohibition

of state issued to prevent the departure of ships or goods in time of war, or to exclude them from a port. (Sm. Merc. Law, 361; Arnould, 837; *Aubert* v. *Gray*, 3 Best & Sm. 163, 166.) **992.**

Barratry.

Barratry is a wilfully wrongful act or neglect, on the part of the master or mariners of the ship, by which the owners of the ship or general freighters are injured. (Sm. Merc. Law, 362–3; 2 Ste. Com. 129; Arnould, 844–5.) **993.**

Losses.

Delay in the voyage occasioned by tempestuous weather, and causing the loss of the cargo (as in the case of perishable goods), is not within an ordinary policy. (*Taylor* v. *Dunbar*, L. R. 4 C. P. 206.) **994.**

Meaning of the Memorandum.

The word "average," as used in the Memorandum, means "partial loss by sea damage," and the expression, "warranted free from average," means "so insured as to exclude all liability for partial loss by sea damage." And the meaning of the clause is, that on certain articles of a peculiarly perishable nature, first enumerated, the underwriter shall not be answerable for any partial loss whatever. 2ndly, That on certain other articles of a less perishable nature, but still very liable to be destroyed by sea damage,

secondly enumerated, he shall only be answerable when the amount of damage exceeds 5 per cent. of their value. 3rdly, That on ship, freight, and all other goods, he shall only be liable when the amount of damage exceeds 3 per cent. 4thly, But that, in all the three cases alike, the underwriter will be liable for any amount of partial loss, however small, in case the ship be stranded; and for every loss, however small, of the nature of general average. (Arnould, 33–4; Sm. Merc. Law, 367–8.) **995.**

Stranding.

In case of stranding, the underwriter becomes liable for every average or partial loss, even though the loss has been in reality not occasioned by the stranding. Stranding, within the sense of the Memorandum, occurs when a ship takes the ground, and remains stationary, either permanently or temporarily, by reason of some extraordinary casualty. (Sm. Merc. Law, 368; Arnould, 878–881.) **996.**

Warranty.

A warranty in a policy is a stipulation, on the literal truth or fulfilment of which the validity of the entire contract depends. **997.**

Express.

Implied.

Warranties are either express or implied. An express warranty is one that appears in

the policy, or in some writing which is by reference incorporated with it. An implied warranty is one which is deemed to exist in every policy, unless expressly negatived. **998.**

Express warranty.

The things usually warranted are; 1, the time of sailing; 2, the safety of the ship at a certain time; 3, departure with convoy, if in time of war; 4, neutrality of the property, if in time of war; 5, freedom from seizure in port. **999.**

The literal truth or fulfilment is so indispensably necessary as a condition precedent to the right of the assured to recover on the policy, that all questions as to the materiality or immateriality of the thing warranted to the risk, or of the substantial truth or fulfilment, and all excuses for want of truth or compliance, are excluded. (Sm. Merc. Law, 372; Arnould, 626, 629–634, 637, 652, 889.) **1000.**

Implied.

The implied warranties are: 1. Not to deviate from the proper course of the voyage; 2. Seaworthiness; 3. Reasonable care to guard against the risks. **1001.**

Deviation.

A deviation from the proper course, unless justified by necessity, discharges the underwriter, not from the commencement, but from the time of deviation; so that it does

not exempt him from loss incurred before the deviation, but he is free from responsibility subsequent to the deviation, though the loss were not occasioned by the deviation, and though the ship resumed her proper course before it happened. (Sm. Merc. Law, 377–380; 2 Ste. Com. 130; Arnould, 393–6, 452.) **1002.**

Seaworthiness (a).

There is an implied warranty of seaworthiness in a voyage policy. The ship must be seaworthy, that is, fit for sea, as regards repairs, equipments, crew, and other matters, at the commencement of the risk, *i.e.*, at the port, where the insurance is "at and from" a port; at the beginning of the voyage, where the insurance is "from" a port. The meaning of the term seaworthiness depends on the situation of the ship, and the service in which she is engaged. Thus, if she was in port, it merely denotes that she was reasonably safe when in such a port; and, therefore, if she is insured "at and from" it, the insurance may be good while she is in the port, although in want of repairs. (Sm. Merc. Law, 381–2; Arnould, 689; *Quebec Marine Insurance*

(a) As to evidence of seaworthiness or unseaworthiness, see *Anderson* v. *Morice*, L. R. 10 C. P. 58; (Ex. Ch.) 609; 1 Ap. Cas. 713. And as to warranty of seaworthiness in a time policy, see *Dudgeon* v. *Pembroke*, L. R. 9 Q. B. 581; 1 Q. B. D (Ex. Ch.) 96; 2 Ap. Cas. 284.

Co. v. *Commercial Bank of Canada*, L. R. 3 P. C. 234.) **1003.**

There is no implied warranty that the ship shall continue seaworthy in the course of the voyage. (Sm. Merc. Law, 382; Arnould, 693.) **1004.**

There may be different stages of seaworthiness in cases where there are different stages of navigation. But the vessel must be seaworthy for each of the stages of navigation when she enters upon each stage: the rendering her seaworthy after the commencement of a given stage and before any loss will not be sufficient. (*Quebec Marine Insurance Co.* v. *Commercial Bank of Canada*, L. R. 3 P. C. 234.) **1005.**

Documents.

The insured must take care that the ship be documented according to her national character; that is, that she be provided with such documentary proofs of her national character as are required by the law for her protection. (Sm. Merc. Law, 384; Arnould, 727.) **1006.**

General and particular average.

The term average is used indiscriminately to denote a loss and a payment in respect of such loss. And there are two kinds of average—general average and particular average. General average loss is a loss arising out of extraordinary sacrifices or ex-

traordinary expenses, incurred for the joint benefit of ship and cargo; and a general average contribution is a contribution that is to be made by all parties in interest towards that loss. A particular average loss is a loss arising from damage accidentally and proximately caused by the perils insured against, or from extraordinary expenditure necessarily incurred for the sole benefit of some particular interest, as of the ship alone or the cargo alone. **1007.**

The damage or expense in the case of particular average, instead of being met by the general body of those who are interested in the adventure, as in the case of general average, falls entirely upon the particular owner of the property constituting the subject of the damage or expenditure. (Arnould, 895, 970–971; *Great Indian Penins. Ry. Co.* v. *Saunders*, 1 Best & Sm. 41; 2 Best & Sm. 266.) **1008.**

Losses.

Loss is either total or partial, called also average loss. A total loss is one on account of which the insured is entitled to recover the whole amount insured. Total losses are either absolute or constructive. An absolute (otherwise called an actual) total loss is one which takes place when the subject insured is wholly destroyed, or cannot be recovered,

Total.

Absolute total loss.

at least without such an expense as to render the attempt to recover it worthless. A constructive total loss is one which takes place when the subject insured is not wholly destroyed, but its destruction is imminent, or its recovery exceedingly doubtful. **1009.**

Constructive total loss.

Liability of underwriters.

In the case of an absolute total loss, the underwriter is liable for the whole amount of his subscription absolutely. But in the case of a constructive total loss, the underwriter is only liable for the whole amount of his subscription, in case the insured, within a reasonable time, gives notice of abandonment. **1010.**

Abandonment.

Abandonment is a relinquishment, to the insurer by the insured, of the subject of insurance, or whatever part thereof may be saved, where the insured calls upon the insurer to settle with him for a total loss, in consequence of the greatness of the damage, the imminent danger of destruction, or the improbability of recovery. (See Arnould, 1007–9; Sm. Merc. Law, 386–7; 2 Ste. Com. 131; *Stringer* v. *English, &c., Insurance Co.*, L. R. 4 Q. B. 676; 5 Q. B. (Ex. Ch.) 599. As to an insurance on freight expected to be earned, see *Potter* v. *Rankin*, L. R. 3 C. P. 562; 5 C. P. (Ex. Ch.) 341; *Rankin* v. *Potter*, L. R. 6 H. L. 83.) **1011.**

The insurer is never obliged to abandon unless he claims for a total loss, in cases where there is neither, on the one hand, an absolute total loss, nor, on the other, only a partial loss. An abandonment is only necessary to make a constructive total loss. The insured may, if he chooses, abstain from giving notice of abandonment, and take the chance of recovering, and, if he recovers part, claim for a partial loss, or, if he recovers nothing, claim for an absolute total loss. (See Arnould, 1008, 1015; Sm. Merc. Law, 390; 2 Ste. Com. 131; *Kaltenbach* v. *Mackenzie*, L. R. 3 C. P. D. (Ap.) 467.) **1012.**

Notice of abandonment is not necessary, where it could be of no use at all to the underwriters. (*Rankin* v. *Potter*, L. R. 6 H. L. 83, 157, 161, 165–6.) **1013.**

Mode of calculating sum to be paid by the underwriter for damage to ship,

If the owner has been obliged to make repairs, in consequence of damage to the ship, he is not allowed the full cost of them, unless the ship was new; but one-third is deducted, in consideration of the benefit which he derives from new materials in lieu of old. This is termed deducting one-third, new for old. (Sm. Merc. Law, 392; Arnould, 996; *Aitchison* v. *Lohre*, L. R. 4 Ap. Cas. 755.) **1014.**

or for damage to goods.

In the case of damage to goods, the course

adopted is this: to ascertain the difference in proportion between the gross proceeds of the goods on their arrival at their destined port, and what would have been their gross proceeds had they not been injured; and then the underwriter pays an aliquot part of the original value corresponding with that difference. Hence, if that difference is a quarter, the underwriter pays a quarter of the original value; not a quarter of what would have been their gross proceeds had they not been injured. For the original value is the sum the underwriter agreed to insure, and not the probable or eventual proceeds. He does not engage to put the merchant in the same position he would have been in had all his goods arrived in sound condition at the port of destination, and realised the profit which would have accrued had they been all sound, but only to put him, in regard to the damaged portion of such goods, in the situation in which he was at the beginning of the risk. (Sm. Merc. Law, 393–4; Arnould, 980–985.) **1015.**

In an open policy, the original value is ascertained by taking the invoice price at the port of lading, together with all expenses till put on board, including premium and costs of insurance. In a valued policy, it is

the value expressed in the policy. (Arnould, 981; Sm. Merc. Law, 394.) **1016.**

Adjustment.

When a loss has taken place, the broker usually proceeds to adjustment, that is, the settling the amount receivable by the assured, after deductions, and the fixing the proportion payable by each underwriter. (Sm. Merc. Law, 395; Mau. & Pol. 370, 373; Arnould, 1199.) **1017.**

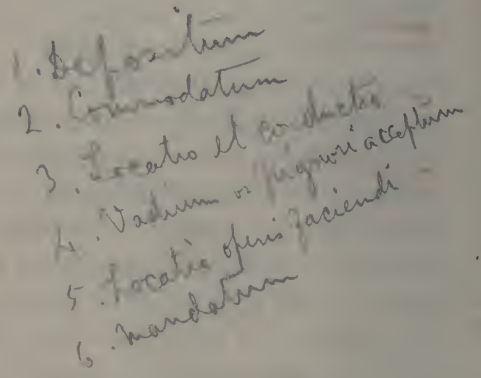
"Return of premium for short interest."

When part only of the goods comprised in the policy are put on board, there is a "return of premium for short interest;" that is, a portion of the premium corresponding to the deficiency must be returned. (Sm. Merc. Law, 403; Arnould, 1224.) **1018.**

Actions by assignees of policies.

Before the stat. 31 & 32 Vict. c. 86, an assignee of a policy of marine insurance could only have maintained an action in the name of the original contractor. But by that Act (s. 1), it is enacted that "whenever a policy of insurance on any ship, or on any goods, in any ship, or on any freight, has been assigned, so as to pass the beneficial interest in such policy to any person entitled to the property thereby insured, the assignee of such policy shall be entitled to sue thereon in his own name; and the defendant in any action shall be entitled to make any defence which he would have been entitled to make

if the said action had been brought in the name of the person by whom or for whose account the policy sued upon was effected." And this enables an assignee to sue in his own name, even where the assignment was made after loss of the goods. (*Lloyd* v. *Fleming*, L. R. 7 Q. B. 299.) **1019.**



CHAPTER X.

BAILORS AND BAILEES GENERALLY.

BAILMENT is a delivery of goods in trust, upon a contract expressed or implied. **1020.**

Definition of bailment.

Different kinds of bailment.

There are six sorts of bailments: 1. A bailment of goods to keep gratuitously for the use of the bailor; which is called depositum. 2. A loan of chattels gratis, to be used by the bailee; which is called commodatum. 3. A delivery of chattels to be used by the bailee for hire, which is called locatio et conductio. 4. A delivery of chattels as a pawn or pledge, to be a security to the bailee for money borrowed from him by the bailor; which is called vadium, or pignori acceptum. 5. A delivery of chattels in order that they may be kept or carried, or that something may be done about them, for a reward, to be paid by the bailor to the bailee; which is called locatio operis faciendi. 6. A delivery of chattels to somebody who is to carry them, or do something about them, gratis; which is called mandatum.

PART III. TIT. II. CAP. X.

(Ad. Torts, 267–8; 1 Sm. L. C. 190–215; Chit. Con. 424.) **1021.**

Responsibility of the different kinds of bailees.

I. Depositum.

I. As to the first (depositum), to constitute a deposit, the subject-matter must be in the actual or constructive possession or under the control of the bailee, and he must consent to take charge of it. The bailee has no right to use the thing deposited; but so long as he holds it rightfully, he is only answerable for great neglect—for the want of that ordinary care which men of common prudence generally exercise upon their own affairs—unless he spontaneously and officiously offered to keep the goods. And the bailee will not be answerable even for gross neglect, if the bailor knew him to be such a person that ordinary care could not reasonably be expected from him. (Ad. Torts, 268; Broom Com. 780, 781; Sm. L. C. 191–2; Chit. Con. 425; Ad. Con. 429–432, 435, 442; *Giblin* v. *McMullen*, L. R. 2 P. C. 317, 337.) **1022.**

II. Commodatum.

II. As to the second (commodatum), the bailee or borrower is answerable for the least neglect, but not for reasonable wear and tear, or for robbery, or unavoidable casualty, unless he improperly keeps it after its return is requested. And the lender is responsible for defects, known to him and not to the

borrower, which make the loan perilous, but not for defects not known to the lender. (Ad. Torts, 268–9; Broom Com. 783; Sm. L. C. 193; Ad. Con. 444–6; Chit. Con. 427; *MacCarthy* v. *Young*, 6 Hurl. & Norm. 329.) **1023.**

When money is paid into a bank, it amounts to a loan to the banker for use and consumption by him, so that the identical money ceases to be the money of the customer, and becomes the money of the banker, of which he may make any use he pleases, so long as he renders an equivalent amount when demanded. (Ad. Con. 446–7.) **1024.**

III. Locatio et conductio.

III. As to the third (locatio et conductio), the bailee is bound to take all ordinary care. The owner must bear the risks to which the chattel is naturally liable, but not risks occasioned by want of ordinary care on the part of the hirer. (Ad. Con. 425–6; Sm. L. C. 193; Chit. Con. 432.) **1025.**

If a person lets out a chattel for a particular use, he impliedly warrants that it is fit for such use. (Ad. Con. 424; *Fowler* v. *Lock*, L. R. 7 C. P. 272; 9 C. P. 751, n.; 10 C. P. 90.) **1026.**

The hirer is bound to use such means as a prudent man would take for the preservation of the property hired from immediate

destruction. And unless the danger has arisen from his own fault, he may maintain an action against the owner, for such money as he, the hirer, is obliged to spend for that purpose, as money paid for the use of the owner at his implied request. (Ad. Con. 425.) **1027.**

The hirer, or a person to whom a chattel is delivered to be repaired, made up, or dealt with in the way of his trade, is not responsible for robbery, disease, or accident, which happens without his fault. (Ad. Con. 426.) **1028.**

A cab driver, who has the use of a cab on the usual terms of driving it about for his own benefit, provided he pays so much to the cab proprietor, is, as between himself and the owner, a bailee for hire, and not a servant or co-adventurer, but as between the owner and the public, he stands in the relation of a servant. (*Fowler* v. *Lock*, L. R. 7 C. P. 272; 9 C. P. 751, n.; 10 C. P. 90; *Venables* v. *Smith*, L. R. 2 Q. B. D. 279.) **1029.**

If the owner of a horse sends his own servant to drive it, the hirer is exempt from all responsibility, unless he takes the management himself, or desires the driver to drive in a particular manner, which occasions the damage complained of. If a horse is taken

ill on the road, the hirer will not be responsible, though the horse die, if he sent for a farrier; but if he did not, he will be answerable. It is also the duty of the hirer to supply the horse with suitable food. (Ad. Torts, 270; Oliph. 202, 204, 206–7; Chit. Con. 432.) **1030.**

IV. Vadium.

IV. As to the fourth kind of bailment (vadium or pignori acceptum), the bailee is only required to use ordinary care for restoring the chattels, unless a tender of the money has been made. But if he retains them after such tender, he will be responsible for them at all events. (Ad. Torts, 271; Sm. L. C. 194; Broom Com. 779, 785; Chit. Con. 428; Ad. Con. 309.) **1031.**

V. Locatio operis faciendi.

V. As to the fifth (locatio operis faciendi), if the bailee exercises a public employment for pay, as in the case of a common carrier, he will be answerable at all events; subject to certain exceptions. (Ad. Torts, 271; Broom Com. 784. See infra, Part III. Tit. III. Cap. III.) **1032.**

But, in general, a private bailee to whom things are delivered, in order that they may be carried, or that something may be done about them, for a reward, is only obliged to use ordinary care (*a*). If lost, however, the

(*a*) As to robbery, disease, or accident, see supra, par. 1028.

loss itself affords the strongest presumption of negligence; and it is for the bailee to rebut this presumption by evidence. (Ad. Torts, 27, 271, 276; Sm. L. C. 197; Broom Com. 784; Chit. Con. 429.) **1033.**

Persons who are paid for taking care of, and not merely for finding a place of deposit for living animals, goods, or chattels intrusted to them for that purpose (such as warehousemen and wharfingers), are bound to take the same care of them which the most careful of men take of their own property. And they are, primâ facie, responsible for a theft committed by their own servants, and can only discharge themselves by showing that the greatest care on their part could not have prevented the theft (*a*). (Ad. Torts, 273–5.) **1034.**

An agister of horses is liable for negligence, if he turns them into a field where there are cows or heifers, and next to a field where there is a bull which he knows is not prevented by a sufficient fence from visiting and does visit the cows or heifers, and one of the horses is injured by the bull. (*Smith* v. *Cook*, L. R. 1 Q. B. D. 79.) **1035.**

VI. Mandatum.

VI. As to the sixth species of bailment (mandatum), if a man acts by commission

(*a*) As to robbery, disease, or accident, see supra, par. 1028.

for another gratis and behaves himself with great negligence, he is answerable. But such a bailee (who is called a mandatory) may revoke his promise to act, if he revokes it and returns the chattel without delay, and before any injury has arisen from his first accepting and then declining the trust. (Ad. Torts, 271; Broom Com. 780–781, 790; Chit. Con. 425–6; Ad. Con. 436–440.) **1036.**

The mandatory may recover any expenses which he necessarily incurs, as money expended by him for the use of the mandator at his implied request. (Ad. Con. 440.) **1037.**

Special qualified property of a bailee,

A bailee has, together with the possession, a special qualified property, enabling him to maintain an action against such as injure or take away the chattels. And he has also, and lien. in certain instances, that right of retaining possession which is called a lien. (2 Ste. Com. 80–81. See supra, par 593b—605.) **1038.**

CHAPTER XI.

HEIRS, EXECUTORS, ADMINISTRATORS, AND TRUSTEES.

Who is an heir.

AN heir is the person on whom the law casts the estate immediately on the death of the ancestor. **1039.**

Liability and benefit of covenants real and bonds.

The obligation of a covenant or bond devolves upon the heir of the covenantor, if the heir is expressly named. But the benefit of a covenant relating to an estate of inheritance may pass to the heir of the covenantee, even though it be entered into with the covenantee and his executors and administrators only. Where such a covenant is broken in the lifetime of the covenantee, and he dies, the right of action is in his personal representative, if the breach has caused damage to his personal estate; but in the heir, if it has caused no such damage, and if the breach is one which continues after the decease of the covenantee. The heir of an obligee in a bond cannot take advantage of the bond, even though it is made with the

obligee and his heirs. (Ad. Con. 837–9; Chit. Con. 94; Sm. Law of Prop. 5th ed. par. 1812–1825, 2241, 2242.) **1040.**

Who is an executor or administrator.

An executor is the person to whom a testator commits the execution of his will. An administrator is the person to whom the Court of Probate commits the management of the affairs of an intestate. **1041.**

Who may be one.

Even married women, with their husbands' consent, and infants may be executors; but no person who is sole executor can act until the age of twenty-one years. (2 Bl. Com. 503; 1 Wms. Ex. 201–2; Ad. Con. 851.) **1042.**

Acts before probate or administration.

An executor may contract and do many acts before he proves a will; but an administrator may do nothing till letters of administration are issued: for the former derives his power from the will, and not from the probate; while the latter derives his title entirely from his appointment as administrator, though his title relates back to the intestate's decease. (Broom Com. 593; 2 Bl. Com. 507.) **1043.**

Personalty vests in the executors, who thereby become liable to creditors and legatees.

The whole personal property vests in the executor: so that the demands of creditors and legatees are personal upon the executor; and though they exist in respect of the property, and are limited by the extent of it,

yet they are no lien upon it, whether in his hands or in the hands of his assignees, unless they are affected with fraud. (1 Wms. Ex. 576; Co. Litt. 290 b, n. 1, xiv. 1.)

1044.

Effect of transfer by a bank to an executor or administrator.

When a testator's or intestate's money at a bank is transferred to the account of his executor or administrator, that is equivalent to a payment by the bank of the debt which they owed to the testator or intestate; and it is a loan of that amount to the bank by the executor or administrator; so that it is a personal contract between him and the bank; and the bank are liable to him personally, and if he overdraws the account he is personally liable to them. The opening of the account in his name, as executor or administrator, operates as a statement to the bank to the following effect:—"The money is not my own absolute property, but belongs to the estate which I am administering; and consequently, though it is vested in me at Law, there may be persons who have equitable claims upon it." If, however, there are no such equitable claims, but, in Equity, it belongs to the executor as residuary legatee, or to the administrator as next of kin; then, he being owner both at Law and in Equity, may set off the amount

Where an executor or administrator may set off money in his name against a debt due from him to a bank.

against a debt due from him to the bank on another private account. (*Bailey* v. *Finch*, L. R. 7 Q. B. 34.) **1045.**

Rights of executors or administrators to damages, covenants, or duties.

Executors and administrators represent the testator or intestate, and are the persons entitled to sue upon all bonds and personal covenants and simple contracts entered into with the testator or intestate; and are entitled to all damages which accrued to the testator or intestate in his lifetime, and, in general, to the benefit of all duties owing to the testator or intestate. (1 Pres. Shep. T. 175; Ad. Con. 842; *Stubbs* v. *Holywell Ry. Co.*, L. R. 2 Ex. 311.) **1046.**

Right of retainer.

An executor or administrator has a right to retain out of legal assets the amount of a debt due to him, either beneficially or as trustee, as against creditors of equal degree. (2 Wms. Ex. 936–8.) But it has been held that this right does not exist in the case of a debt bequeathed to an executor after a decree in an administration suit. (*Jones* v. *Evans*, L. R. 2 Ch. D. 420.) **1047.**

Liability of representatives in matters of contract.

Parties to a contract bind their personal representatives, even without naming them, but not their heirs, unless named. (Chit. Con. 94; *Bradbury* v. *Morgan*, 1 Hurl. & Colt. 249.) So that executors or administrators are responsible, to the extent of the

assets come to their hands, upon all contracts of their testator or intestate, even where their heir is named, and they are not named in the contract. (Ad. Con. 847; Sm. Law of Prop. 5th ed. par. 1814.) **1048.**

Contracts which do not survive.

Executors or administrators, however, are not entitled to the benefit of, or subject to liability on, executory contracts which are so strictly personal to their testator or intestate that the nature of the case requires that such contracts, and all liability and benefit attaching thereto, should die with him; as in the case of contracts by authors to write a book; contracts by medical men to cure a patient; promises of marriage, &c. (Ad. Con. 849; Sm. Law of Prop. 5th ed. par. 1814. See *Stubbs* v. *Holywell Ry. Co.*, L. R. 2 Ex. 311.) **1049.**

Presentment, notice of dishonour, transfer, and payment of bills and notes.

Presentment, notice of dishonour, and payment of a bill or a note should be made by or to the personal representative of a deceased party; and on the death of a holder of a bill or note, his personal representatives may transfer it. (Byles, 50; Chit. B. 141, 246, 252, 270, 335.) **1050.**

Liability of executors or administrators in matters of tort.

By the common law, if an injury was done to the person or property of another, for which damages only could be recovered in satisfaction, the action died with the

person by whom the wrong was committed: actio personalis moritur cum personâ. And this is the rule at the present day; except that by the stat. 3 & 4 Will. IV. c. 42, s. 2, an action of trespass or trespass on the case may be maintained against the executors or administrators of a deceased person, "for any wrong committed by him within six calendar months before his death to another in respect of his property," if such action is brought within six calendar months after such executors or administrators have taken upon themselves the administration of the estate. (2 Wms. Ex. 6th ed. 1596–1602; *Morgan* v. *Ravey*, 6 Hurl. & Norm. 265.) **1051.**

The rule at Law as well as in Equity, now is, that an executor or administrator is in the position of a gratuitous bailee, who cannot be charged with the loss of assets without wilful default. (*Job* v. *Job*, L. R. 6 Ch. D. 562.) **1051a.**

Where executor or administrator is personally liable.

An executor or administrator is personally liable for money lent to or received by him, or for orders for the funeral given by him, or for other work performed for him, or goods sold and delivered to him. (Broom Com. 595; Chit. Con. 9th ed. 249; 2 Wms. Ex. 6th ed. 1654.) **1052.**

Orders for a

Where a person, in a case of necessity,

funeral.

gives reasonable orders for a funeral, in consequence of the neglect of the executor or other party who was bound to give such orders, such person makes himself personally responsible to those to whom he gives such orders. But he is entitled to reimbursement by the executor or other party. (See Wms. Ex. 6th ed. 1652–4; Chit. Con. 9th ed. 557.)

1053.

Administration of assets of insolvent estates and companies.

By the Supreme Court of Judicature Act, 1875 (38 & 39 Vict. c. 77, s. 10), it is enacted (in lieu of the 1st sub-section of s. 25 of the principal Act, 36 & 37 Vict. c. 66), that "in the administration by the Court of the assets of any person who may die after the commencement of this Act, and whose estate may prove to be insufficient for the payment in full of his debts and liabilities, and in the winding-up of any company under the Companies Acts, 1862 and 1867, whose assets may prove to be insufficient for the payment of its debts and liabilities and the costs of winding-up, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future or contingent liabilities, respectively, as may be in force for the time

being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt; and all persons who in any such case would be entitled to prove for and receive dividends out of the estate of any such deceased person or out of the assets of such company, may come in under the decree or order for the administration of such estate, and make such claims against the same as they may be respectively entitled to by virtue of this Act." **1054.**

Distribution of the assets.

If an executor or administrator has (except under the direction of a competent Court, or except in the case provided for by the stat. 22 & 23 Vict. c. 35, s. 29) paid away the residue, in ignorance of the existence of a debt, he is still liable. (2 Spence, 921.) But an executor or administrator fairly stating the facts and paying over the assets under the direction of the Court in an administration suit, is fully indemnified against all existing or contingent demands on the estate. (*Waller* v. *Barrett*, 24 Beav. 413.) And by the stat. 22 & 23 Vict. c. 35, s. 29, where an executor or administrator has given such notices as would have been given by the Court of Chancery in an administration suit for creditors and others to send in to the exe-

cutor or administrator their claims against the estate of the testator or intestate, such executor or administrator will, at the expiration of the time named in the notices for sending in such claims, be at liberty to distribute the assets among the parties entitled thereto, having regard to the claims of which such executor or administrator has then notice, and will not be liable for the assets so distributed to any person of whose claim such executor or administrator shall not have had notice at the time of distribution of such assets. **1055.**

Action for a distributive share or legacy.

An action at Law would not lie against the personal representative, as such, for a distributive share of an intestate's property, or for a legacy, other than a specific legacy to which the executor had assented, except in the County Courts for a sum not exceeding 50*l*. But an action might be maintained against him for such a share or a general legacy, not as executor or administrator, but as admitting that he had possession of a definite sum belonging to the plaintiff. (2 Wms. Ex. 1746–8; Rosc. 727; Chit. Con. 246.) **1056.**

Action for trust money.

Again, an action was not maintainable by a cestui que trust against his trustee, as such, for money in his hands; for, at Law, the property belonged to the trustee. But

a cestui que trust might sue at Law for an ascertained sum of money admitted by the trustee to be in his hands and to belong to the cestui que trust absolutely. (Chit. Con. 260–1; Ad. Con. 34, 36.) **1057.**

Executor de son tort.

If a person, who is neither executor nor administrator, interferes with the estate of the deceased in this country, in an officious and unnecessary manner, he constitutes himself what is called an executor de son tort, and becomes subject to all the liabilities of an executor. (1 Wms. Ex. 225–240; Ad. Con. 850.) But there are many acts which a stranger may do, where needful, without incurring any such liability; such as giving directions for the funeral of the deceased, making an inventory of his effects, providing necessaries for his children, or doing other acts of kindness which are due from one neighbour or friend to another. (Chit. Con. 9th ed. 338.) **1058.**

The executor of an executor de son tort is not liable for the acts of the deceased person in whose property the executor de son tort has intermeddled. (*Wilson* v. *Hodson*, L. R. 7 Ex. 84.) **1059.**

There may be an executor de son tort of a term alone. (1 Wms. Ex. 6th ed. 248; *Williams* v. *Heales*, L. R. 9 C. P. 177.) **1060.**

TITLE III.

RELATIONS OF LIFE IN RESPECT OF EMPLOYMENT.

CHAPTER I.

EMPLOYERS AND EMPLOYED; INCLUDING MASTERS, SERVANTS, WORKMEN, APPRENTICES, AND OTHERS.

A CONTRACT of hiring and service need not be created or evidenced by writing, unless it is for more than a year. (Ad. Con. 382.) **1061.**

Legal import of the term servant.

The term servant legally applies not only to menial servants, but to other persons employed for hire in a person's domestic establishment, or in his business; such as tutors, governesses, and clerks. **1062.**

Hiring, when presumed.

A hiring at reasonable wages may be presumed from the very fact of service, where it is customary to pay them, except in the case of near relatives. (Ad. Con. 382; Sm. Mast. and Serv. 113, 114.) **1063.**

Duration of service, and notice required to determine it.

If no time is limited for the duration of the service, either expressly or by implication, the hiring is a general one, and is

ordinarily deemed to be for a year certain, unless there are circumstances which give rise to a different presumption; and if the servant continues beyond the first or any subsequent year, a contract for a second or further year is implied. Where the hiring is for a year, and so from year to year so long as the parties please, not determinable by custom or agreement, a reasonable notice on either side is necessary to determine it, expiring at the end of the current year of the service. A quarter's notice is sufficient in all cases; but in many cases, a month's notice is enough. (See references infra, par. 1066.) **1064.**

Where an agreement is entered into to act as agent "for twelve months certain, after which time either party shall be at liberty to terminate the agreement by giving to the other a three months' notice," there at the close of the twelve months, the agreement can be determined by either party without any notice; and the stipulation as to a three months' notice only applies in case of the engagement being prolonged beyond twelve months. (*Langton* v. *Carleton*, L. R. 9 Ex. 57.) **1065.**

Whether verbally or in writing, a general hiring of menial or domestic servants, *i.e.*, a

hiring without any engagement as to the duration of the service, but at a yearly sum, is a hiring for a year, and so on from year to year, dissoluble by a month's warning (*a*) on either side, or payment by the master, or forfeiture or payment by the servant, of a month's wages. Quarterly, monthly, or weekly wages are, however, not inconsistent with a yearly hiring, but may be merely a mode of payment. But in the absence of indications to the contrary, a general hiring at monthly or weekly wages is but a hiring for a month or a week, and so on from month to month, or from week to week. (Sm. Merc. Law, 425–6; Sm. Mast. and Serv. 2nd ed. 46, 50, 52; 3rd. ed. 105; 2 Ste. Com. 239–240; Rosc. 11th ed. 278; Chit. Con. 8th ed. 533, 535; Ad. Con. 6th ed. 366–7, 371; *Nicoll* v. *Greaves*, 17 C. B. (N. S.) 27, 34.) **1066.**

It would seem that the indefinite engagement of a governess or a clerk is an engagement for a year, but determinable by three months' notice. (Pollock, C. B., in *Fairman* v. *Oakford*, 5 Hurl. & Norm. 635.) **1067.**

Unless there is an express or implied stipulation to the contrary, there is an implied condition in contracts for personal services,

(*a*) This would seem to be a calendar month, if the wages are paid for a calendar month.

that the death of either party shall dissolve the contract. (*Farrow* v *Wilson*, L. R. 4 C. P. 744.) **1068.**

Responsibility of an employer for the acts or negligence of the person employed (*a*).

Where a mischief arises, not from an act ordered to be done, but from the improper mode of doing it, the person who ordered the act to be done without ordering it to be done in an improper way, may be responsible, even where the relation of master and servant did not exist between him and the person who actually did the work. So that where a person employs a contractor to do a work, such person may be liable for the consequences of the improper mode in which the workmen of the contractor do the work, as well as the contractor himself. But, in general, the person who was the proximate cause of the damage is the only person responsible, unless he did it when acting within the scope of his employment as the servant of another; and then the latter is responsible. So that a contractor and his servant are responsible, and, in general, not the person who employed the contractor. And hence where the contractor employed a sub-contractor, the sub-contractor is responsible for the injury caused by his own servants, and the contractor himself is not responsible.

(*a*) As to purchases by servants, see infra, par. 1115.

(*Butler* v. *Hunter*, 7 Hurl. & Norm. 826; *Blake* v. *Thirst*, 2 Hurl. & Colt. 20; *Picard* v. *Smith*, 10 C. B. (N. S.) 470; *Hole* v. *Sittingbourne Ry.*, 6 Hurl. & Norm. 488; *Gray* v. *Pullen*, 5 Best & Sm. (Ex. Ch.) 970; *Searle* v. *Laverick*, L. R. 9 Q. B. 122; *Taylor* v. *Greenhalgh*, L. R. 9 Q. B. 487; Ad. Torts, 4th ed. 413, 414; *Lord Bolingbroke* v. *Local Board of Swindon New Town*, L. R. 9 C. P. 575; *Bower* v. *Peate*, L. R. 1 Q. B. D. 321; *Smith & Co.* v. *West Derby Local Board*, L. R. 3 C. P. D. 423.) **1069.**

Where, however, one person lends or hires his servant to another person for a particular employment, so as to be under the orders and control of the latter, the servant, for anything done in that employment, must be deemed the servant of the person to whom he is so lent or hired, although he remains in other respects the servant of the person who so lent or let him out to hire. (*Rourke* v. *White Moss Colliery Co.*, L. R. 2 C. P. D. (Ap.) 205.) **1070.**

A person is answerable for the wrongful acts, or negligence, or unskilfulness of his domestic servants, and of those whom the law denominates his servants (as being selected and appointed by him to do any work, although not in his immediate employ or

under his superintendence), if such acts, negligence, or unskilfulness occurred strictly in doing that which they were employed to do, or in acting within the general scope of their authority, as his servants. And the servant is also himself liable for any injury he may have caused a third person. But where the injury, whether it was done wilfully or otherwise, was not done by the servant of a particular master strictly in doing that which he was employed to do, or in acting within the general scope of his authority, as the servant of such master, redress can only be had from him, unless the master knew the servant to be of such a character that such an injury would not be unlikely to happen. Thus, the master is responsible for injury caused by his servant in riding or driving, unless the servant cannot be regarded as having caused the injury when acting under his master's orders, but in pursuing his own wrongful devices. The owner of a carriage let out to hire is responsible for his driver, unless the injury happens in consequence of the latter being required by the hirer to do some unusual or improper thing. (Broom Com. 669, 670, 672, 676, 685; Sm. Mast. and Serv. 183, 185, 188, 190, 191, 193; 2 Ste. Com. 245–8; Ad. Torts, 21, 22,

241–2, 324–5; Rosc. 518; *Seymour* v. *Greenwood*, 6 Hurl. & Norm. 359; 7 Hurl. & Norm. 355; *Dalyel* v. *Tyrer*, Ell. Bl. & Ell. 899; *Williams* v. *Jones*, 3 Hurl. & Colt. 256, 602; *Murphey* v. *Carelli*, 3 Hurl. & Colt. 462; *Limpus* v. *London General Omnibus Co.*, 1 Hurl. & Colt. 526; *North* v. *Smith*, 10 C. B. (N. S.) 572; *Poulton* v. *London & S. W. Ry. Co.*, L. R. 2 Q. B. 534; *Edwards* v. *London & N. W. Ry. Co.*, L. R. 5 C. P. 445; *Walker* v. *South Eastern Ry. Co.*, and *Smith* v. *Same*, L. R. 5 C. P. 640; *Murray* v. *Currie*, L. R. 6 C. P. 24; *Allen* v. *London & S. W. Ry. Co.*, L. R. 6 Q. B. 65; *Tebbutt* v. *Bristol & Exeter Ry. Co.*, L. R. 6 Q. B. 73; *Moore* v. *Metropolitan Ry. Co.*, L. R. 8 Q. B. 36; *Bayley* v. *Manchester, &c., Ry. Co.*, L. R. 7 C. P. 415; (Ex. Ch.) 8 C. P. 148; *Burns* v. *Poulson*, L. R. 8 C. P. 563; *Lord Bolingbroke* v. *Local Board of Swindon New Town*, L. R. 9 C. P. 575; *Rourke* v. *White Moss Colliery Co.*, L. R. 2 C. P. D. (Ap.) 205; *Whiteley* v. *Pepper*, L. R. 2 Q. B. D. 276.) And a cab proprietor is liable for an accident occasioned by a driver who has paid a certain sum for the use of the cab. (*Venables* v. *Smith*, L. R. 2 Q. B. D. 279.) **1071.**

Where a servant left his horse and cart

unattended, to go home to his dinner, at the time allowed him for his dinner, though told he was not to go home to his dinner, and the horse, which he had placed before his house, ran away and did damage, the servant was deemed to have been guilty of negligence when acting within the general scope of his employment, which was to have charge of the horse and cart, and the master was held to be liable. (*Whatman* v. *Pearson*, L. R. 3 C. P. 422.) But, on the other hand, where a carman, carter, or coachman does an injury in driving where he had no business to be driving, it has been held that the master is not liable, because the servant is not doing what he has been employed to do, or acting in the course of his employment, but the contrary. (*Storey* v. *Ashton*, L. R. 4 Q. B. 476; *Rayner* v. *Mitchell*, L. R. 2 C. P. D. 357.) **1072.**

Some judges have laid it down as a rule simply that whenever a master intrusts to his servant a horse or carriage or anything which may readily be made an implement of mischief, the master will be responsible for the negligent management thereof. But a qualification to this effect is generally added—"so long as the servant is using it, or dealing with it, in the ordinary course of his em-

α He who acts through another acts through himself.
β. He who receives the advantage ought also to suffer the burden.

ployment." Compare *Storey* v. *Ashton*, L. R. 4 Q. B. 479; *Rayner* v. *Mitchell*, L. R. 2 C. P. D. 359, 360. **1073.**

Such a qualification is necessary. Without it, the rule would work very hardly and unjustly towards the master. The rule is based on the maxims, α "Quod facit per alium, facit per se," and β "Qui sentit commodum, sentire debet et onus." But where the servant is not acting within the scope of his employment, the master is neither actually nor virtually acting at all, any more than if he were a stranger; nor is he reaping any advantage by employing a servant to act for him; and therefore there is no reason why he should bear any corresponding loss from the servant's misconduct. And as to the point that the third person would commonly go without compensation if he could only sue the servant, he would be in no worse condition than if the person who did the injury were not a servant, but a poor man acting as a principal. Nor could the expediency of giving the injured person compensation be a sufficient reason for making the master suffer, when he was wholly without blame. **1074.**

There is an implied authority to a person to do all those things that are necessary for the protection of property entrusted to him,

or for fulfilling the duty which he has to perform. But, any further than is required for its actual protection or recovery, a person entrusted with property has no implied authority to put the law in motion with reference to an offence committed in connexion with that property, so as to render the employer responsible for acts done by the employed in reference to the property. (*Allen* v. *London & S. W. Ry. Co.*, L. R. 6 Q. B. 65, 69, 72.) **1075.**

For a crime or wilful injury committed by the servant, he himself is alone liable, unless done by the master's command or encouragement. (2 Ste. Com. 248–9; Rosc. 518, 613; Selw. 1119; Ad. Con. 431.) **1076.**

Responsibility of a person providing accommodation.

If a man undertakes, for a valuable consideration, to provide accommodation for the persons of others (as by conveying them, or erecting a stand for them at a race-course), he is liable to them for any injury they sustain by reason of the negligence or unskilfulness of the manufacturer or contractor, or of the servants of the manufacturer or contractor whom he employed. (*Francis* v. *Cockrell*, L. R. 5 Q. B. 184; (Ex. Ch.) 501). **1077.**

It has been held that a livery-stable keeper, who for reward lodges a carriage in

a coach-house, is not liable for damage to the carriage, arising from the defective construction of the coach-house, if he was not aware of it, and there was nothing to lead him to suspect it, and if he employed a proper person as contractor. (*Searle* v. *Laverick*, L. R. 9 Q. B. 122.) But this decision does not seem in harmony with the above case of *Francis* v. *Cockrell*, and cannot be relied on. On the contrary, the writer considers it to be contrary to sound principle. A livery-stable keeper ought to be deemed to be under an obligation to provide a safe repository for the carriages of persons who have paid him for taking care of them. The livery-stable keeper had a right of action against the contractor; and they ought to have a right of action against the livery-stable keeper. Otherwise there is, unnecessarily, a great wrong without a remedy. Whereas, in the way suggested the loss is eventually borne by the party who occasioned it, as it ought to be. **1078.**

The principle on which a private person or a company is liable for damage occasioned by the neglect of servants, applies to a corporation entrusted by statute to perform certain works and to receive a certain recompense for the same, though the money

received as such recompense is not applicable to the use of the individual corporators or of the corporation. (*Mersey Docks Trustees* v. *Gibbs*, L. R. 1 H. L. 93; *Coe* v. *Wise*, L. R. 1 Q. B. (Ex. Ch.) 711; *Foreman* v. *Mayor of Canterbury*, L. R. 6 Q. B. 214; *Smith & Co.* v. *West Derby Local Board*, L. R. 3 C. P. D. 423.) And, in the case of a towing path, even assuming that no obligation was cast upon the corporation to repair it, yet so long as they keep it open, and take toll for its use, they are under an obligation to those whom they invite to use it to take reasonable care, either to see that it is in such a state as not to expose those who use it to undue danger, or to give due warning against such danger. (*Winch* v. *The Conservators of the Thames*, L. R. 9 C. P. (Ex. Ch.) 378.) **1079.**

Liability for injury to servants.

An employer is responsible for an injury to his servant or to the servant of a contractor or person whom he employs, arising from his (the employer's) negligence, in a case in which it was peculiarly necessary that care should have been taken by him. (*Clarke* v. *Holmes*, 6 Hurl. & Norm. 349; 7 Hurl. & Norm. 937; *Mellors* v. *Shaw*, 1 Best & Sm. 437; *Watling* v. *Oastler*, L. R. 6 Ex. 73; *Fowler* v. *Lock*, L. R. 7

PART III. TIT. III. CAP. I.

C. P. 272; 9 C. P. 751 n.; 10 C. P. 90.) (*a*).

1080.

Subject to the statute 43 & 44 Vict. c. 42, which has just passed whilst this sheet has been going through the press (*b*), a master is not responsible for an injury happening to one of his servants, in consequence of the negligence of another of his servants; provided the servants were engaged in one common employment, or in accomplishing one common general object; though not necessarily one common, immediate, or particular object, and provided the servant was not exposed to unreasonable risks, and the master endeavoured to select proper servants, and did not knowingly acquiesce in the negligence. This principle applies even to railway companies and their servants; and has been held to apply

(*a*) The case of *Woodley* v. *Metrop. District Ry. Co.*, L. R. 2 Ex. D. 384, as decided on appeal, was inconsistent with this proposition, and produced a great injustice. The three judges and jury in the Court below gave a poor working man £300 as a compensation, for a serious injury by a railway company caused by acting in derogation of that proposition. Two of the judges on appeal concurred with the Court below. But the poor man was deprived of all compensation by the majority (only three) of the judges on appeal, or, in other words, by the minority of three against five of the total number of eight judges, and against what one of those three (the Lord Chief Justice himself) regarded as the right decision, "morally speaking," p. 389.

(*b*) See Appendix, p. 643.

to cases in which the negligent servant was of superior authority, whose lawful orders the injured servant was bound to obey. (Ad. Torts, 248; Broom Com. 685–6; Sm. Mast. and Serv. 134, 145; Rosc. 518, 532; Ad. Con. 386; Chit. Con. 523; *Potter* v. *Faulkner*, 1 Best & Sm. 800; *Searle* v. *Lindsay*, 11 C. B. (N. S.) 429; *Abraham* v. *Reynolds*, 5 Hurl. & Norm. 143; *Senior* v. *Ward*, 1 Ell. & Ell. 385; *Waller* v. *South Eastern Ry. Co.*, 2 Hurl. & Colt. 102; *Lovegrove* v. *London, B. & S. C. Ry.*, and *Gallagher* v. *Piper*, 16 C. B. (N. S.) 669; *Hall* v. *Johnson*, 3 Hurl. & Colt. 589; *Murphy* v. *Smith*, 19 C. B. (N. S.) 361; *Warburton* v. *Great Western Ry. Co.*, L. R. 2 Ex. 30; *Feltham* v. *England*, L. R. 2 Q. B. 33; *Wilson* v. *Merry*, L. R. 1 H. L. Sc. 326; *Howells* v. *Landore Steel Co.*, L. R. 10 Q. B. 62; *Smith* v. *Steele*, L. R. 10 Q. B. 125.) But it does not apply to a pilot. (*Lovell* v. *Howell*, L. R. 1 C. P. D. 161; *Allen* v. *The New Gas Co.*, L. R. 1 Ex. D. 251; *Rourke* v. *The White Moss Colliery Co.*, L. R. 1 C. P. D. 556; 2 C. P. D. (Ap.) 205.) **1081.**

The principle of the exception which exempts a master from liability to a servant, for injury caused by the negligence of a fellow servant, is, that the risk is contemplated by

the servant when he enters the service; and that he undertakes the risk as incident to his employment. And hence this exception applies in cases where, although the immediate object on which the one servant is employed is very dissimilar from that on which the other is employed, yet the risk of injury from the negligence of the one is so much a natural and necessary consequence of the employment which the other accepts, that it must be included in the risks which have to be considered in his wages. Thus, whenever an employment, in the service of a railway company, is such as necessarily to bring the person accepting it into contact with the traffic of the line, risk of injury from the carelessness of those managing that traffic is one of the risks necessarily and naturally incident to such employment, and within the principle. (*Morgan* v. *Vale of Neath Ry. Co.*, 5 Best & Sm. 570, 736; L. R. 1 Q. B. (Ex. Ch.) 149, 151, 154–5; *Tunney* v. *Midland Ry. Co.*, L. R. 1 C. P. 291; *Lovell* v. *Howell*, L. R. 1 C. P. D. 161; *Swainson* v. *North Eastern Ry. Co.*, L. R. 3 Ex. D. (Ap.) 341; *Charles* v. *Taylor*, L. R. 3 C. P. D. (Ap.) 492.) **1082.**

But for this rule, a master might be ruined by the malice or carelessness of his servants.

Yet its application should be kept within reasonable bounds. The leaning should be against extending it. (*Swainson* v. *North Eastern Ry. Co.*, L. R. 3 Ex. D. (Ap.) 341.)

1083.

The writer conceives that it ought not to be held to apply where an injury is caused by the neglect of a manager—in some cases at least. For example, he regards *Allen* v. *The New Gas Co.* (L. R. 1 Ex. D. 251) as wrongly decided. Workmen might incur the most fearful and unreasonable risks, if such a decision was good law, especially in the service of insolvent employers. If employers choose to act by a manager, instead of seeing to the safe state of things for themselves, they ought to be responsible for his neglect. **1084.**

Refusal of a servant to expose himself to injury.

A servant may decline to do that from which he has reason to apprehend bodily injury. (Ad. Torts, 247.) **1085.**

Legal consequences of want of care, knowledge, or skill on the part of the persons employed.

A person who undertakes any duty, employment, or trust, is under an implied contract to act with all reasonable care, diligence, and ability, and in accordance with instructions given and assented to, and, in the absence of any agreement as to price, for a reasonable pecuniary remuneration. If he does not, he is responsible to his employer

for damages. And it may be stated to be a rule applicable to employers and employed generally, that if there has been no beneficial service, owing to the gross fault of the person employed, he is entitled to no pay; and if his work has been productive of injury rather than benefit, he is liable to an action. (Ad. Torts, 250–1; Ad. Con. 20, 22, 415–417; Chit. Con. 491–2.) **1086.**

An arbitrator or a quasi-arbitrator, acting honestly, is not liable to an action for want of skill or care: the parties take him for better or worse. (*Pappa* v. *Rose*, L. R. 7 C. P. 32; (Ex. Ch.) 525; *Tharsis Sulphur, &c., Co.* v. *Loftus*, L. R. 8 C. P. 1.) But a valuer is liable to such an action. And he may be interrogated as to the basis of his valuation. (*Turner* v. *Goulden*, L. R. 9 C. P. 57.) **1087.**

Discharge.

A servant may be discharged for the following causes:—1. Wilful disobedience of a lawful order. 2. Gross moral misconduct. 3. Habitual negligence, or conduct calculated seriously to injure his master's business, or unlawfully absenting himself from his work to any serious extent, or refusal to do it, or other conduct which might be prejudicial to his master. 4. Incompetence, or permanent disability from illness. And, on the above

grounds of misconduct, the master may discharge him without warning, and without assigning any specific act of misconduct, if any existed, as the cause of dismissal: and he need only pay the wages accrued due at or before the time of the dismissal, and not wages calculated pro rata up to the time of the dismissal, though not then due. (Sm. Mast. and Serv. 77, 85; 2 Ste. Com. 243; Rosc. 11th ed. 278–9; Chit. Con. 8th ed. 535; Ad. Con. 6th ed. 369, 370, 373; *Horton* v. *McMurtry*, 5 Hurl. & Norm. 667.)

Right to wages on dismissal or quitting service.

1088.

If a domestic is temporarily disabled by sickness or other accident, this does not justify the master in discharging him without such warning or wages as he might otherwise claim. (Sm. Mast. and Serv. 85; Rosc. 352.) **1089.**

A servant hired generally, and dismissed without cause, has a right to damages for the loss he has sustained in consequence of the dismissal, and his inability to obtain another equally eligible situation. And on the other hand, if a servant quits his master without cause before the end of the period when he would be entitled to a payment, he thereby forfeits all right to wages for the broken period. (Sm. Merc .Law, 426–7; Sm. Mast.

and Serv. 113, 127; Ad. Con. 6th ed. 371–3; Chit. Con. 8th ed. 533, 535; Rosc. 11th ed. 278.) **1090.**

Servants or workmen neglecting or refusing to work.

Some servants and workmen may be summoned before justices of the peace for neglecting or refusing to fulfil their contracts, and may, on that account, be discharged without wages, and committed to gaol. And disputes as to non-payment of their wages are to be determined by justices of the peace. (See Ad. Con. 388, 391.)

Disputes about wages.

1091.

Medical relief.

A master is not bound to provide his servant with medicine or medical attendance. But if a master gets medical aid for his servant, while under his roof, the master is liable; and he cannot deduct the expense from the servant's wages, unless it was so agreed. (Sm. Mast. and Serv. 131–2; Ad. Con. 386, 389, 391; Chit. Con. 522–3.)

1092.

Giving a character.

A master is not bound to give his servant any character at all. If, however, he gives a character, it ought, of course, to be a true one. Yet if he gives a bad character untruly, he will not be liable; except in some cases where he gives it without being applied to; or unless there is proof of malice; as where it is proved to have been contrary

to his knowledge or belief. (Sm. Mast. & Serv. 249–250; 2 Ste. Com. 245; Ad. Torts, 589; Broom Com. 722; Selw. 1055, 1267; Rosc. 567; *Jackson* v. *Hoppleston*, 16 C. B. (N.S.) 829.) **1093.**

A master is bound, in answer to inquiries, to give information of misconduct of which a servant has been guilty after having left his service. And if a master gives a good character, he is bound to communicate to the person to whom such character was given, any subsequently discovered circumstances which show that it was not deserved. (Ad. Torts, 589–590; Sm. Mast. & Serv. 258–9.) **1094.**

Fire.

Servants, through whose negligence or carelessness a fire happens, are punishable by a fine of 100*l.*, or imprisonment. But the master is also responsible for any such damage caused by the negligence of his servant, while executing his orders. (Ad. Torts, 132; Sm. Mast. & Serv. 185, 281.) **1095.**

Enticing away a servant, or keeping him from his master.

A person who knowingly induces a servant to leave his master's service, or keeps him as servant after he has quitted his place, and before the expiration of the stipulated period of service, is liable to an action. (Ad. Torts, 696; Sm. Mast. & Serv. 87–9; 2 Ste. Com. 245.) And a person may bring an action

Enticing away a child.

for enticing away his child, as his servant, even though it be only for a few days, and though the service rendered by the child may have been only at the will of both parties. (*Evans* v. *Walton*, L. R. 2 C. P. 615.) **1096.**

Action for injury to a servant.

A master may sue for the seduction of, or any personal injury to, his servant, if he thereby loses the servant's services. (Broom Com. 814; Sm. Mast. & Serv. 96–8; Rosc. 590.) But it has been held (extraordinarily, as the writer submits) that he cannot so sue if the injury produces immediate death. (*Osborn* v. *Gillett*, L. R. 8 Ex. 88.) **1097.**

Employing another person's task workman.

A workman by the job or piece is the servant of the person who contracted with him, until the work is finished; and whilst the work is in progress no other person may employ him, so as to cause it to be unfinished. (Ad. Torts, 696.) **1098.**

Payment reduced resisted.

The sum agreed to be paid for any work may be reduced, by showing that the work or materials were of an inferior quality to what they ought to have been; or the claim may be entirely resisted, by showing that the work will not answer the intended purpose. (Chit. Con. 512.) **1099.**

Non-commencement

A person may refuse the services of an-

other whom he has agreed to employ, if such other person does not commence his work on the day named. But he cannot refuse to pay such person on account of his having failed to complete it by the appointed time; though he may sue him for any damage thereby sustained. (Ad. Con. 403–4.) **1100.**

or non-completion in time.

The contract of apprenticeship is a contract whereby one person, as master, engages to instruct another, as his apprentice; and whereby the latter becomes bound to devote his whole time and services, during a limited period, for the benefit of his instructor, and frequently also to pay him a sum of money. (Sm. Merc. Law, 458; Ad. Con. 392–3.) **1101.**

Contract of apprenticeship.

A writing is necessary to constitute an apprenticeship; and indeed it is now usually effected by deed, containing covenants by the master and apprentice, or by some one on behalf of the apprentice, for the due discharge of the duties of the master and apprentice towards each other. **1102.**

An infant may bind himself; but he may avoid the agreement, even while under age, if it is clearly for his interest to do so. But infants are usually bound apprentices by their parents with their consent; and pauper children are bound by the guardians of the

Rights of master and apprentice.

poor, and are called parish apprentices. **1103.**

No action will lie against an apprentice upon any of the covenants in the deed of apprenticeship, except where the apprenticeship is in the City of London. But in case of any disobedience to the master's lawful orders, or of negligence or immorality, the master may administer to him, if an infant, moderate and reasonable corporal chastisement, such as a father may inflict upon his child, or a schoolmaster upon his pupil; and he may also bring him before justices of the peace, who may punish him; or he may maintain an action, in case of gross misconduct, against any adult who has covenanted for his good behaviour. On the other hand, the master is bound to minister to the apprentice's necessities in health and in sickness; providing him with food, medicine, and medical attendance. And the master may be sued, or, in a gross case, indicted, for ill-usage or neglect of the apprentice. (Sm. Merc. Law, 458, 460; Sm. Mast. & Serv. 76, 131, 329; Ad. Con. 392–4; Macph. 479, 480; 2 Ste. Com. 240–1; Chit. Con. 139, 522.) **1104.**

Determination of apprenticeship.

There are various ways in which an apprenticeship may be dissolved. Thus, 1. It

may be determined by consent of the parties in case the apprentice is under age, and the dissolution is for his advantage. 2. By the election of an apprentice at his full age, where the dissolution is clearly for his benefit. 3. By the master's bankruptcy. 4. By the death of the master or apprentice. 5. By the interposition of justices, upon certain grounds, on the complaint of the master or of the apprentice. (Sm. Merc. Law, 458, 461; Ad. Con. 394–5.) **1105.**

Transfer of services.

By the consent of all parties, a transfer may be made of the services of the apprentice to another master. (Sm. Merc. Law, 462.) (*a*). **1106.**

Death of master or apprentice.

If either the master or the apprentice dies at any time during the term of the apprenticeship, it has been held that no action for a return of the premium or any part of it will lie. (*Whincup* v. *Hughes*, L. R. 6 C. P. 78. In this case the master died at the end of the first of the six years.) **1107.**

(*a*) As to the custom of apprenticeship in the City of London, see an interesting article in the *Law Magazine* for August, 1862.

CHAPTER II.

PRINCIPALS AND AGENTS; LEGAL PRACTITIONERS AND CLIENTS; MEDICAL MEN AND PATIENTS.

Agent defined.

AN agent is a person empowered to act in the name of another, who is called his principal. **1108.**

Who may be agent.

An infant may be an agent. And a feme covert may be agent, either for her own husband or another person. (Sm. Merc. Law, 117; Broom Com. 517; 2 Ste. Com. 64; Ad. Con. 609, 766; Chit. Con. 194–5.) **1109.**

Mode of appointment.

An agent may in general be appointed even verbally, or tacitly by conduct. But an agent for the purposes of the 1st, 2nd, and 3rd sections of the Statute of Frauds, must be appointed in writing. And an agent who is to execute a deed, must be appointed by deed. (Sm. Merc. Law, 118; Broom Com. 534; 2 Ste. Com. 64; Chit. Con. 193–4.) **1110.**

What may be deputed.

That which a person may do himself as

principal, he may (except in one or two cases) appoint an agent to do for him. But an agent cannot delegate the duties of his agency, unless specially authorized or justified by the usage of trade, except those which are of such a nature that he cannot be expected to perform them personally. (Sm. Merc. Law, 116; Broom Com. 516; 2 Ste. Com. 67; Chit. Con. 201.) **1111.**

Money received by sub-agent.

A sub-agent employed to receive money is accountable only to the agent; and the agent is accountable to the principal for the money received by the sub-agent. (Ad. Con. 593–4.) **1112.**

Different sorts of authorities.

Agencies, as regards their extent, are of three kinds: 1. Special, which are authorities to do a particular act, or carry out a particular matter. 2. General, which are authorities to do everything that is requisite in relation to a particular business or employment. 3. Universal, which are authorities to do all acts that the principal may depute another to do. So that a man may have both a special and a general agent, or one general agent in regard to one business, and another general agent in regard to another business. (Broom Com. 517, 518; 2 Ste. Com. 65; Sm. Merc. Law, 120, 134–5; Chit. Con. 197.) **1113.**

Extent of agent's authority.

Again, an agent may be limited by certain instructions as to his conduct, or unlimited, leaving his conduct to his own discretion. If limited by instructions, he ought to carry them into effect as fully and exactly as possible, consistently with propriety. If unlimited, he ought to pursue the accustomed course of business, or, if prevented, to give notice to his principal. (Sm. Merc. Law, 120; Selw. 807.) **1114.**

An agent has authority to bind his principal, not only where he is expressly authorized, but in other cases where such authority is to be inferred from the conduct of the employer. As between the principal and third persons, the agent's authority, where not expressly defined, must be measured by the extent of his usual employment. If a person sends his servant with ready money to buy, and he buys upon credit, the master is not chargeable, unless the servant has by the master's order previously bought of the same person upon credit, and the credit has not been distinctly withdrawn by notice to the tradesman or his foreman or manager. (Sm. Merc. Law, 131–2; Ad. Con. 608, 610–612; Rosc. 377; Chit. Con. 196, 198–9; Sm. Mast. & Serv. 3rd ed. 243.) If a master has allowed his servant to buy on credit, he

must pay for goods wrongfully bought of the same person by the servant. (Chit. Con. 198.) If a clerk has been allowed to draw, indorse, or accept notes or bills, he will acquire an implied authority to bind the master, though the money never come to the master's use. The same principle is applied to all other mercantile transactions, and even though the servant has been dismissed from his employer's service, provided the third parties had no reason to be aware of such dismissal. **1115.**

The authority of the agent must be inferred from facts connected with the employment, not from considerations of the utility or propriety of such an authority. (Sm. Merc. Law, 132–4; Ad. Con. 608, 610, 611.) **1116.**

A general agent is only authorized to act in the usual way of business. (2 Selw. 807.) **1117.**

Under ordinary circumstances, agents are authorized to do all that is necessary or usual for effectuating the main intention of the principal in the best manner. (Sm. Merc. Law, 137; Broom Com. 521; Chit. Con. 95, 200; Ad. Con. 608, 619.) **1118.**

Although a shopman be authorized by his employer to receive payment for goods in the shop, that would not necessarily involve an

authority to receive money for his employer elsewhere. (Broom Com. 521; Chit. Con. 657.) **1119.**

Unless the principal has previously sanctioned such a course, the agent has ordinarily no implied general authority to borrow on behalf of the principal, so as to make him responsible. (Ad. Con. 613.) **1120.**

Exceeding authority.

If a particular agent exceeds his authority, and the opposite party is not aware of it, the agent is personally liable, but his principal is not bound; for it is the duty of persons dealing with him to ascertain his authority, if they seek to charge his principal. But if a general agent exceeds his authority, or violates the orders given him, his principal is bound, provided his acts are within the usual dealing and scope of the business. And a person intrusted with the general management of the business, as manager or foreman, has an implied general authority to enter into all usual and necessary contracts. And a principal cannot, unknown to parties dealing with his general agent, restrict the agent's authority to perform all things customary in the business. (Sm. Merc. Law, 134–5; Ad. Con. 608, 610–613, 630; 2 Ste. Com. 68; Broom Com. 517, 520; Chit. Con. 197, 200, 209, 210; Byles, 35; *Edmunds* v.

Bushell, L. R. 1 Q. B. 97; *Spedding* v. *Nevell*, L. R. 4 C. P. 212; Sm. Mast. & Serv. 3rd ed. 236, 242.) Thus, if the servant or agent of a private individual, intrusted on one occasion to sell a horse, takes upon himself, without authority from his master, to warrant the soundness of the animal, the master is not bound. But if the servant of a horse-dealer, or even one who occasionally assists him in his business, being employed to sell, gives a warranty, the principal is bound, even though the agent or servant was expressly forbidden to warrant. (*Howard* v. *Sheward*, L. R. 2 C. P. 148.) **1121.**

If an agent exceeds his authority, he is answerable to his employer for any loss arising therefrom; but any benefit will belong to his employer. (Sm. Merc. Law, 120–1; Chit. Con. 210.) **1122.**

Misapprehending order.

If a principal gives an order to an agent in such ambiguous terms as to be susceptible of two different meanings, and the agent bonâ fide adopts one of them, and acts upon it, the principal cannot repudiate the act as unauthorized, because he meant the order to be read in the other sense. The principal must bear the loss arising from his own indistinctness of expression. (*Ireland* v. *Livingston*, L. R. 5 H. L. 395, 416.) **1123.**

False assumption of authority.

Persons who induce others to act upon the supposition that they (the former) have authority to enter into a binding contract on behalf of third persons, may be sued for damages for the breach of an implied warranty of authority, on it turning out that they have no such authority. (*Richardson* v. *Williamson*, L. R. 6 Q. B. 276, 279.) **1124.**

Agent acting in a public capacity.

If any agent notoriously acts in a public capacity, and it is obvious that the opposite party must have relied on the good faith of the government or other irresponsible employers, the agent will not be personally liable. (Ad. Con. 631.) **1125.**

Accounts.

It is the duty of an agent to keep clear and regular accounts and vouchers, and to communicate the result to his principal from time to time; and if he does not, he will not be allowed the compensation which would otherwise belong to his agency. And if he mixes up his principal's property with his own, he is put to the necessity of showing clearly what part of the property belongs to him; and so far as he is unable to do this, it is treated, both at Law and in Equity, as the property of the principal. (Sm. Eq. Manual, 13th ed. par. 664.) **1126.**

Profits.

Even at Law, the profits acquired by a

servant or agent in the course of, or in connexion with, his service or agency, belong to his master or principal. (*Morison* v. *Thompson*, L. R. 9 Q. B. 480.) **1127**.

Distinctions as to remunerated and unremunerated agents.

A remunerated agent may be compelled to fulfil his engagement: an unremunerated agent cannot; but if he begins to act, and is guilty of misconduct, he will be liable. A remunerated agent is liable for the consequences of his want of skill: an unremunerated agent is only bound to use that skill which he possesses. A remunerated agent is bound to act with reasonable diligence: an unremunerated agent is only answerable for gross negligence. (Sm. Merc. Law, 120, 128; Sm. Con. 152; Chit. Con. 426.) **1128**.

Commission.

The agent's remuneration is called his commission. The amount is fixed by the contract, or by usage, or statute; or if not so fixed, it may be determined by a jury. He may be deprived of his commission by neglecting to keep an account, or by other gross misconduct or negligence, or by gross unskilfulness, or by selling to himself or to a company in which he is a shareholder that which he is intrusted to sell. (Sm. Merc. Law, 129; Ad. Con. 595; Chit. Con. 496; Story on Agency, § 326, 331–4; *Salomons* v. *Pender*, 3 Hurl. & Colt. 639.) **1129**.

If instructions are given to several house or estate agents to sell or let a house or estate, the successful agent is alone entitled to commission, unless the others have been instructed to advertise or render some particular service, for which they are entitled to remuneration by the custom of the trade. (Ad. Con. 597.) **1130.**

An authority to sell or let may be revoked, so as to deprive the agent of his commission; but he is entitled to remuneration for any trouble or expense properly incurred by him. (Ad. Con. 597–8; Rosc. 397.) **1131.**

Duty of house agents.

Every house agent is under an implied undertaking to make all proper inquiries as to the respectability and solvency of any one whom he introduces as a tenant. (Ad. Con. 598.) **1132.**

Advances by agent.

An agent may charge his principal with all advances which he has made in the regular course of trade, or in some pressing emergency. (Sm. Merc. Law, 130–1; Story on Agency, § 335–6.) **1133.**

Indemnity.

The principal is bound to indemnify his agent against all losses, damages, and expenses incurred in properly executing his office. (Sm. Merc. Law, 131; Story on Agency, § 339–340; Chit. Con. 459, 461–2; Ad. Con. 598.) **1134.**

Execution of a deed.

An agent who executes a deed may either sign his principal's name, or express that it is executed by himself as agent for his principal, or by his principal, through him, the agent. But if he simply signs his own name, his principal will not be bound. (Sm. Merc. Law, 138–9; Paley, 180–2; Ad. Con. 625.) **1135.**

Drawing, indorsing, or accepting bills or notes.

An agent may be specially appointed, or by some general or implied authority empowered, to draw, indorse, or accept negotiable instruments; and in such cases the principal is said to draw, indorse, or accept by procuration. Authorities to draw, indorse, or accept bills, are construed strictly. An agent so acting should not merely sign his own name; for if he does, he will himself be liable to the holder. It should be expressed that the act is done by the principal, through the medium of the agent: as where the agent A. signs thus—"A. for B.," or "B. by A.;" or, "by procuration of A.," or "B. per procuration, A." (Sm. Merc. Law, 139; Ad. Con. 609, 628; 1 Selw. 362; Chit. B. 158, 162; Byles, 29, 30, 33; *Stagg* v. *Elliott*, 12 C. B. (N. S.) 373; *Edmunds* v. *Bushell*, L. R. 1 Q. B. 97.) **1136.**

If the directors of a company sign their

names to a promissory note, though they describe themselves as "we, the directors," &c., and though they affix the company's seal, it has been held that they are personally liable, unless they state that they are acting on behalf of the company, or otherwise exclude their personal liability. For it is considered that by the mere description and the seal, they only intend to indicate, that as between themselves and the company, it was for the company they were signing the note. (*Dutton* v. *Marsh*, L. R. 6 Q. B. 361.) **1137.**

The words per procuration denote a limited authority, into the extent of which the person who takes the bill is bound to inquire. (1 Selw. 362; Byles, 30, 33; *Stagg* v. *Elliott*, 12 C. B. (N. S.) 373.) **1138.**

Sales by an agent.

Any person may contract for the purchase of goods with an agent who is intrusted with the possession of the goods, or to whom they are consigned, and may receive the same of, and pay for the same to, the agent, even knowing him to be such, if such contract and payment are made in the ordinary course of business, unless with notice that the agent is not authorized to sell or to receive the price. (Sm. Merc. Law, 142; 2 Ste. Com. 77; Ad. Con. 166: Rosc. 635;

6 Geo. IV. c. 94, ss. 3, 4; *Baines* v. *Swainson*, 4 Best & Sm. 270.) **1139.**

Pledges, lien, or securities by an agent.

An agent intrusted with the possession of goods, or of the documents of title to goods, is also deemed to be the owner of such goods and documents, so far as to give validity to any pledge, lien, or security by such agent for advances made to him bonâ fide at the time; notwithstanding the person claiming such pledge, lien, or security may have had notice that the person giving it is only an agent, unless he has notice that the agent is not authorized to give the same. (Sm. Merc. Law, 143; 2 Ste. Com. 77; Rosc. 635; Ad. Con. 300–302; Chit. Con. 202; 5 & 6 Vict. c. 39, ss. 1, 3; *Gobind Chunder Sein* v. *Ryan*, 15 Moo. P. C. 230: *Vickers* v. *Hertz*, L. R. 2 H. L. Sc. 113.) **1140.**

The agent here meant is such as the vendee or pledgee might well suppose had power to sell or pledge. (*Fuentes* v. *Montis*, L. R. 3 C. P. 268; *Cole* v. *North Western Bank*, L. R. 9 C. P. 470; 10 C. P. (Ex. Ch.) 354; *Johnson* v. *The Credit Lyonnais Co.*, L. R. 3 C. P. D. (Ap.) 32.) And it has been held that no such pledge, lien, or security, is valid, if created by an agent after his authority has been revoked. (*Fuentes* v. *Montis*, affirmed by Ex. Ch. L. R. 4 C. P. 93.) **1141.**

PART III. TIT. III. CAP. II.

Stat. 40 & 41 Vict. c. 39.

By the stat. 40 & 41 Vict. c. 39 (passed 10th August, 1877, and entitled "An Act to amend the Factors' Acts"), it is enacted as follows :—

Act to amend Factors' Acts.

"In this Act, the expression 'the principal Acts,' means the following Acts; that is to say,—

Factors' Act defined.

The Act of the 4th Geo. IV. (1823) c. 83.

The Act of the 6th Geo. IV. (1825) c. 94.

The Act of the 5th & 6th of Her Majesty (1842) c. 39.

And the said Acts and this Act may be cited for all purposes as the 'Factors' Acts, 1823 to 1877.'" (s. 1.) **1142.**

Amendment of law with respect to secret revocation of intrustment or agency.

"Where any agent or person has been intrusted with and continues in the possession of any goods, or documents of title to goods, within the meaning of the principal Acts as amended by this Act, any revocation of his intrustment or agency shall not prejudice or affect the title or rights of any other person who, without notice of such revocation, purchases such goods, or makes advances upon the faith or security of such goods or documents." (s. 2.) **1143.**

With respect to vendors permitted

"Where any goods have been sold, and the vendor or any person on his behalf con-

tinues or is in possession of the documents of title thereto, any sale, pledge, or other disposition of the goods or documents made by such vendor or any person or agent intrusted by the vendor with the goods or documents within the meaning of the principal Acts as amended by this Act so continuing or being in possession, shall be as valid and effectual as if such vendor or person were an agent or person intrusted by the vendee with the goods or documents within the meaning of the principal Acts as amended by this Act, provided the person to whom the sale, pledge, or other disposition is made has not notice that the goods have been previously sold." (s. 3.) **1144.**

to retain documents of title to goods.

"Where any goods have been sold or contracted to be sold, and the vendee, or any person on his behalf, obtains the possession of the documents of title thereto from the vendor or his agents, any sale, pledge, or disposition of such goods or documents by such vendee so in possession, or by any other person or agent intrusted by the vendee with the documents within the meaning of the principal Acts as amended by this Act, shall be as valid and effectual as if such vendee or other person were an agent or person intrusted by the vendor with the

With respect to vendees permitted to have possession of documents of title to goods.

documents within the meaning of the principal Acts as amended by this Act, provided the person to whom the sale, pledge, or other disposition is made has not notice of any lien or other right of the vendor in respect of the goods." (s. 4.) **1145.**

With respect to transfers of documents of title.

"Where any document of title to goods has been lawfully indorsed or otherwise transferred to any person as a vendee or owner of the goods, and such person transfers such document by indorsement (or by delivery where the document is by custom or by its express terms transferable by delivery, or makes the goods deliverable to the bearer) to a person who takes the same bonâ fide and for valuable consideration, the last-mentioned transfer shall have the same effect for defeating any vendor's lien or right of stoppage in transitu as the transfer of a bill of lading has for defeating the right of stoppage in transitu." (s. 5.) **1146.**

Act not to be retrospective.

"This Act shall apply only to acts done and rights acquired after the passing of this Act." (s. 6.) **1147.**

Notice to agent or to principal.

Notice to the agent, if in the same transaction, is notice to the principal; and notice to the principal, generally speaking, is notice to the agent. And the agent's representation binds the principal; and his admission, in

Agent's representation or admission.

the matter of the contract is evidence against the principal. (Sm. Merc. Law, 150–151; 2 Selw. 815; Powell, 157–9.) **1148.**

Set-off.

And where an agent buys, on behalf of his principal, goods from a factor, with a knowledge that the goods are not the goods of the factor, such knowledge on the part of the agent of the buyer, however acquired, is the knowledge of the buyer, and therefore the buyer cannot set off against the price a debt due to him from the factor. (*Dresser* v. *Norwood*, 14 C. B. (N. S.) 466.) **1149.**

If goods are intrusted to an agent as the apparent owner thereof, and he sells them as his own with the consent of the principal, and the purchaser believed them to be the goods of the agent, and before he, the purchaser, knew to the contrary, the agent became indebted to the purchaser, the purchaser may claim a set-off, notwithstanding he had the means of knowing that the goods belonged to the principal. (*Borries* v. *The Imperial Ottoman Bank*, L. R. 9 C. P. 38.) **1150.**

Payment, tender, or delivery to an agent.

Payment, tender, or delivery to an agent, in the usual course of his employment, is payment, tender, or delivery to the principal. Thus, payment to a person found in a mer-

chant's counting-house, and in possession of the merchant's books, and apparently authorized to receive money for him, is payment to the merchant himself, though in reality such person was not in the merchant's employment. And payment to the solicitor of a plaintiff in an action is equivalent to payment to the plaintiff himself. But payment to an agent employed to sell an estate is not payment to the vendor, unless the agent is expressly authorized to receive the purchase-money. And the fraudulent or wrongful receipt of an agent *may* not be deemed to be the receipt of the principal. Nor will payment to an agent in general bind the principal, unless it is in money. (Sm. Merc. Law, 151–4; 1 Selw. 108; Ad. Con. 604–5, 633, 982; Chit. Con. 656–7.) So that an agent is only authorized to receive payment in cash, in the absence of any direction, practice, or custom to the contrary. (*Catterall* v. *Hindle*, L. R. 1 C. P. 186; 2 C. P. (Ex. Ch.) 368.) And hence payment to an auctioneer by a bill of exchange is not a valid payment, for the purpose of discharging the purchaser. (*Williams* v. *Evans*, L. R. 1 Q. B. 352.) **1151.**

A debtor should not pay to an agent money due upon a written security, such as

a bill or bond, unless the agent produces the security, or unless the debtor knows that the agent is empowered to receive the money; for, otherwise, the debtor may not be discharged, if the money does not reach the principal. (Sm. Merc. Law, 153; Paley, 274–6.) **1152.**

To whom an agent who has received money is accountable.

If an agent has received money on behalf of his principal, and for his use, he is accountable to the principal alone. And an agent to whom money has been paid with a direction to hand it over to a third person, is only accountable to his principal, and not to such third person, unless he has entered into a binding engagement with such third person, which has given the latter a right of action against him. (Chit. Con. 556; Ad. Con. 34–5, 632, 633.) **1153.**

Responsibility for agent's acts or neglect.

A principal is not answerable for the wilful and malicious tort of his agent. But he is answerable for the agent's negligence or for those acts which, if not fraudulent or wrongful, would have been within the scope of the agent's ordinary authority; for it is more reasonable that where one of two innocent persons must suffer, the principal, who employed the deceiver or wrong-doer, should suffer, rather than the deceived or injured, who neither directly nor indirectly occasioned

the loss. And the same principles apply to companies and their agents. And the principal is answerable whenever he has sanctioned the agent's fraud or wrong, or elected to take the benefit of it. (Ad. Torts, 753; 2nd ed. 759, 760; Sm. Merc. Law, 154–6; Ad. Con. 617; *Barwick* v. *Eng. Joint Stock Bank*, L. R. 2 Ex. (Ex. Ch.) 259; *Proudfoot* v. *Montefiore*, L. R. 2 Q. B. 511; *Spedding* v. *Nevell*, L. R. 4 C. P. 212; *Swift* v. *Winterbotham*, L. R. 8 Q. B. 244; 9 Q. B. (Ex. Ch.) 301; *Mackay* v. *Commercial Bank of New Brunswick*, L. R. 5 P. C. 394, 410–412.) **1154.**

Determination of agent's authority.

The agent's power is in general determinable: 1. By the revocation of the principal, unless it is coupled with an interest, or given for valuable consideration; as in the case of a power of attorney given by way of security. But in order to determine the agent's authority by revocation, means should be used to make known such revocation as completely as the employment was known. Notice should be given in the *Gazette* to strangers, and to customers and correspondents by direct communication. 2. By the agent's renunciation of it, with the consent of the principal. 3. By the marriage of the principal, if a feme sole. 4. By the principal's

death (*a*). 5. By his bankruptcy, except in certain cases. 6. By the fulfilment of his commission. 7. By the expiration of the time limited for the duration of the agency. (Sm. Merc. Law, 158–160; 2 Ste. Com. 65; Ad. Con. 587–8, 612; Chit. Con. 195–6; Byles, 33.) **1155.**

Ratification of the act of an agent.

An act professedly done for another person, though without any precedent authority from him, becomes his act, if subsequently ratified by him. (Broom Com. 681; Ad. Con. 609; Chit. Con. 161, 199.) **1156.**

Agent's liability.

Agents (except masters of ships) professedly contracting, as such, for known and responsible employers, and brokers entering into contracts, as such, though they do not disclose the names of their principals, incur no personal liability to third parties, except for losses incurred by their own fault or negligence, unless it appears to have been intended that the agent should be personally responsible; or unless by the custom of the trade, the agent (as in the case of a broker in the London fruit trade) is personally responsible. But if an agent contracts, without professing to act as an agent, the opposite party may, in most cases, at his option,

Where principal and agent may sue and be sued.

(*a*) But see 22 & 23 Vict. c. 35, s. 26, as to trustees executors, and administrators.

charge either the agent or the principal, on discovering him. And the rule appears to be the same, where, at the time of contracting, he states himself to be an agent, but does not disclose his principal. (Sm. Merc. Law, 123–4, 161, 168; 2 Sm. L. C. 321, 333, 336; Broom Com. 516, 526–7, 529; Byles, 34; 2 Ste. Com. 66; Ad. Con. 601–2, 607, 625–9, 631; Rosc. 376; Chit. Con. 101, 204, 207; *Reid* v. *Dreaper*, 6 Hurl. & Norm. 813; *Fleet* v. *Murton*, L. R. 7 Q. B. 126; *Hutchinson* v. *Tatham*, L. R. 8 C. P. 482.) But a vendor, who has given credit to an agent, believing him to be the principal, cannot recover against an undisclosed principal, if the latter has paid the agent at a time when the vendor still gave credit to the agent, and knew no one else as principal. (*Armstrong* v. *Stokes*, L. R. 7 Q. B. 598.) Where the principal named has no existence at the time, as in the case of a company not yet formed, the agent is personally liable. (*Kelner* v. *Baxter*, L. R. 2 C. P. 174.) **1157.**

A person signing a contract in his own name, without qualification to his signature, may not be exempted from liability by merely describing himself, in the body of the contract, as agent for another; for this description may have been merely intended as a

notice of his acting for another in case it were necessary to refer to such other person, or as an earmark of the transaction. This, at least, is the case when such other person is a foreign principal. For, where a man signs a contract in his own name, without adding some such words as "on account," or "as agent of" another, he is primâ facie a contracting party and liable. But if there are plain words to show that he is contracting on behalf of some one else, such as the words "on account of," or "as agent of" another person, the latter is the person liable. (*Paice* v. *Walker*, L. R. 5 Ex. 173; *Southwell* v. *Bowditch*, L. R. 1 C. P. D. 100; Id. (Ap.) 374; *Gadd* v. *Houghton*, L. R. 1 Ex. D. (Ap.) 357.) **1158.**

The insertion of the agent's name alone in the contract, though the principal is disclosed at the time, and the subsequent demand of payment from the agent, does not necessarily amount to an election to give credit to the agent, and to him alone, but the principal may be sued. (*Calder* v. *Dobell*, L. R. 6 C. P. (Ex. Ch.) 486.) **1159.**

A servant or agent cannot sue upon a contract entered into by him as such, unless he has some beneficial interest in respect of commission or otherwise, or some special

property or interest, as in the case of a factor, carrier, warehouseman, auctioneer, or other agent, having a right of remuneration, growing out of the business. If, however, an agent lends money or enters into any other contract in his own name, but in reality for an undisclosed principal, and the contract is not under seal, there, in general, either principal or agent may sue upon it. But if it is under seal, or by bill of exchange or promissory note, the agent alone can sue upon it. Yet the power of the agent to sue is subservient to the right of the principal: so that if the principal has required or obtained a completion of the contract with himself personally, the agent's right ceases. (Sm. Merc. Law, 161, 167; Broom Com. 527; 2 Ste. Com. 66; Ad. Con. 600–602, 607, 622–4; 2 Sm. L. C. 333, 336; Chit. Con. 9th ed. 205–6, 210, 211; *Browning* v. *Provincial Insurance Co. of Canada*, L. R. 5 P. C. 263.) **1160.**

Difference between factors and brokers.

Factors are mercantile agents who are entrusted with the possession and disposal of property. Brokers are mercantile agents who are employed to enter into contracts respecting property, without being in possession of such property. Both of them are general agents. (Sm. Merc. Law, 118; 2 Ste.

Com. 76; Chit. Con. 192, 199. As to brokers, see *Fowler* v. *Hollins*, L. R. 7 Q. B. (Ex. Ch.) 616; affirmed, 7 H. L. 757.) **1161.**

A broker cannot sue in his own name upon contracts made by him as broker. (*Fairlie* v. *Fenton*, L. R. 5 Ex. 169.) **1162.**

Duty of a factor.

It is the duty of a factor to keep the goods with the same care with which a prudent man would keep his own; and it is often, if not usually, his duty to insure them, or if unable to insure, to give notice of his inability to his principal. (Sm. Merc. Law, 124–5; Story on Agency, § 111; Paley, 15, 16; Chit. Con. 430.) **1163.**

Price.

If no price is fixed for the goods, the factor must sell them for their fair value. He may sell for credit, or not, according to the usual course of business. If he gives reasonable credit, where it is usual, to a person of good credit, he is discharged, and will be entitled to his commission, notwithstanding any subsequent insolvency of the purchaser; provided he informs his principal of the transaction within a reasonable and usual time. (Sm. Merc. Law, 126; Paley, 26–7; Ad. Con. 588.) **1164.**

Credit.

Del credere.

Sometimes, however, the factor sells under a commission called del credere, from an Italian mercantile phrase signifying guaran-

tee, by which the factor, for an additional premium, warrants, and makes himself responsible for the solvency of the purchaser. (Sm. Merc. Law, 126; 2 Ste. Com. 76; Ad. Con. 589; Chit. Con. 193, 496.) **1165.**

Rules of law as to solicitors.

It is the duty of a solicitor to keep his client's secrets, and not to disclose the contents of any of his title-deeds; and to warn his client not to enter into covenants and stipulations where they are attended with unusual liability; and to conduct his client's business with a reasonable degree of care, skill, and despatch. And if he is guilty of gross default, negligence, or ignorance, he is liable to an action by his client. (Ad. Torts, 251–2; Pulling, 148; Chit. Con. 504, 506; Ad. Con. 417, 418.) **1166.**

Where any doubt or question arises as to the interpretation and legal operation of assurances, a solicitor may take the opinion of counsel upon them for his protection. If, instead of doing this, he relies upon his own judgment respecting them, and makes mistakes, he will be answerable in damages. (Ad. Torts, 253–4; Pulling, 423.) **1167.**

A solicitor is liable for the mistakes or negligence of his agent, where he would

have been liable had he himself been guilty of them. (Chit. Con. 509.) **1168.**

Rules of law as to counsel.

A barrister cannot contract for his fees, and has no legal remedy for the recovery of them. On the other hand he cannot be sued for negligence, mistake, or unskilfulness. (Chit. Con. 515; Ad. Con. 22, 402; *Kennedy* v. *Broun*, 13 C. B. (N. S.) 677.) **1169.**

An advocate of the English bar, accepting a brief in the usual way, undertakes a duty, but does not enter into any contract or promise, expressed or implied. (*Swinfen* v. *Lord Chelmsford*, 5 Hurl. & Norm. 890.) **1170.**

Counsel is not liable to any action for any act that he does in good faith in the conduct of a suit, even for entering into a compromise. (*Swinfen* v. *Lord Chelmsford*, 5 Hurl. & Norm. 890.) **1171.**

Rules of law as to medical men (*a*).

A physician cannot sue for payment of his fees, or in respect of medicines supplied by him, unless he has expressly contracted for remuneration; nor unless he proves at the trial that he is registered under the Medical Act, and even then he cannot sue if there is a bye-law of the College of Physicians

(*a*) See supra, par 190, 191.

to which he belongs prohibiting him from suing. (21 & 22 Vict. c. 90, s. 31, 32; amended, 22 Vict. c. 21; 23 Vict. c. 7; 23 & 24 Vict. c. 66; Chit. Con. 516; Ad. Con. 6th ed. 900; Davis's County Court, 4th ed. 703–4; Rosc. 12th ed. 446.) **1172.**

A medical practitioner registered under the Medical Act (21 & 22 Vict. c. 90), but only as a member of the College of Surgeons, and holding no other qualification, cannot recover for attendance and medicines supplied, except in a surgical case. (*Leman* v. *Fletcher*, L. R. 8 Q. B. 319.) **1173.**

If a surgeon or apothecary is guilty of gross unskilfulness or carelessness, he is entitled to no fees, but is liable to an action, as for a tort, where the patient has sustained any injury. (Chit. Con. 501; Ad. Torts, 251.) **1174.**

Whether a patient be liable for attendances, as well as for medicines, is a question to be decided by the jury, depending on the existence of a contract to that effect, or on the reasonableness of such demand in the particular case. (Chit. Con. 8th ed. 514.) **1175.**

CHAPTER III.

CARRIERS, PASSENGERS, AND OWNERS OF LUGGAGE; INNKEEPERS AND GUESTS; LODGING-HOUSE KEEPERS AND LODGERS.

THIS subject might have been treated of under the preceding Title; but, on the whole, it seemed more proper or natural to consider it in this place.

Definition of a common carrier.

In general, a common carrier is one who plies between certain termini, whether by land or by water, and regularly undertakes, for a pecuniary remuneration, to transport the goods of all such as choose to employ him (*a*). **1176.**

Of this description are the proprietors of stage-waggons and coaches carrying goods, barge owners, possessors of ships and boats engaged generally in the conveyance of goods

(*a*) See references at end of next paragraph. And see *Nugent* v. *Smith*, L. R. 1 C. P. D. 19; Id. (Ap.) 423. In the *Liver Alkali Company* v. *Johnson*, L. R. 7 Ex. 267; 9 Ex. (Ex. Ch.) 338, it was held that a bargeman who let out his barges was a common carrier, and responsible as such, though he did not let a barge to more than one person for the same voyage, and he did not ply between any fixed termini.

for hire, and canal and railway companies, unless the Act constituting them limits their liability. (Sm. Merc. Law, 287; Chit. & Tem. on Car. 14–18; Selw. 441; Rosc. 422–3; Chit. Con. 433; Ad. Con. 485.)

1177.

Duty of carriers.

Every common carrier is under a legal obligation to carry all things belonging to the description of articles which he publicly professes to carry, and he is bound to do so for any one who is ready to pay him (in advance, if desired,) his customary hire; provided he has room for the things in his cart or carriage, to convey them in safety. But he may, if he pleases, carry, under a special contract limiting his liability, anything which he does not usually profess to carry. The hire for such goods as he usually professes to carry must be at a reasonable rate. (Ad. Torts, 304; Broom Com. 793; 2 Ste. Com. 83–4; Chit. & Tem. on Car. 23–5, 60, 77–80; 1 Selw. 441; Rosc. 423; Chit. Con. 433–4; Ad. Con. 485–6.) **1178.**

A carrier is not at liberty to refuse to carry on the ordinary terms. But it would seem that if it is sought to impose upon him a liability of an extraordinary nature, arising out of peculiar circumstances, he is entitled to decline to carry, unless he is paid a higher

rate of carriage. And where sufficient notice is given to him of the special circumstances, and he consents nevertheless to carry the goods, he will in general be liable, on the ground of implied contract, for the extraordinary damages arising out of such circumstances. (See remarks of Pigott, B., and Lush, J., in *Horne* v. *Midland Ry. Co.*, L. R. 8 C. P. (Ex. Ch.) 143, 145.) **1179.**

A carrier is not bound to convey goods by the shortest route, but only by the route by which he usually carries them, and which he professes to go; and he may charge accordingly. (*Myers* v. *London & S. W. Ry. Co.*, L. R. 5 C. P. 1.) **1180.**

Every common carrier of passengers with luggage is bound to carry for them such things as are usually taken as luggage by persons travelling. But he is not bound to carry articles of another kind, such as merchandise, unless he professes to carry them, or unless the traveller tenders or is ready to pay the customary hire for them. And a carrier has a right to limit the weight and bulk of that which he professes to carry. (Ad. Torts, 304; 1 Selw. 441; Chit. & Tem. on Car. 282–3, 286; Rosc. 435.) **1181.**

It is the duty of a common carrier to take proper care of the goods he carries; and to

make a safe delivery of them to the consignee or some person expressly or impliedly authorized by him to receive them; and to make such delivery at the time agreed, or, in the absence of any stipulation in that respect, within a reasonable time, unless prevented by circumstances beyond his control. (Sm. Merc. Law, 288; Ad. Torts, 319; 1 Selw. 441; Chit. & Tem. on Car. 34, 86, 89, 91, 291; Rosc. 423; *Hales* v. *London & N. W. Ry. Co.*, 4 Best & Sm. 66; *Taylor* v. *Great Northern Ry. Co.*, L. R. 1 C. P. 385.) **1182.**

If a horse is sent by rail, and no one appears to claim it when it arrives at its destination, the railway company are bound to take care of it, and, if necessary, are justified in sending it to a livery stable; and they may sue the owner for the charges which it was necessary to incur thereby. (*Great Northern Ry. Co.* v. *Swaffield*, L. R. 9 Ex. 132.) **1183.**

Damages for non-delivery within the agreed time.

Whenever either the object of the sender is specially brought to the notice of the carrier, or circumstances are known to the carrier from which the object ought in reason to be inferred, so that the object may be taken to be within the contemplation of both parties, damages may be recovered for the natural consequences of the failure of that object, owing to the carrier's fault. Hence,

a railway company are liable for loss of time and loss of profit from non-delivery of goods within the time agreed on, where they knew or ought to have known the object for which the goods were sent. (*Simpson* v. *London & N. W. Ry. Co.*, L. R. 1 Q. B. D. 274, 277.)

1184.

Responsibility of carriers of goods.

At Common Law a carrier is in the nature of an insurer of the goods he carries until they reach the place to which they are consigned, though not of the persons of passengers. And the law, independently of any contract, renders every common carrier responsible for loss of the goods from any cause, except from the negligence of the owner, or from their very nature, their quality, their inherent vice or defectiveness, or their peculiar tendency or liability, or from acts of God, or acts of enemies of the Sovereign, where, in none of these cases, the loss might have been averted by reasonable care on the part of the carrier. By the term "act of God," is meant something independent of the act of man; such as storms, gusts of wind, lightning, inundations, sudden death or illness, and accidents not resulting from human agency. With the above exceptions, a carrier is liable for loss even by robbery, or where the danger or accident

may have been unavoidable, and there may have been no negligence on the carrier's part. (Ad. Torts, 306–7; Broom Com. 791–2; Chit. & Tem. on Car. 34–44, 154; 2 Ste. Com. 83; Selw. 442, 444; Rosc. 423, 435; Chit. Con. 435, 439; Ad. Con. 495; *Kendall* v. *London & S. W. Ry. Co.*, L. R. 7 Ex. 373; *Blower* v. *Great Western Ry. Co.*, L. R. 7 C. P. 655; *Gill* v. *Manchester, &c., Ry. Co.*, L. R. 8 Q. B. 186; *Nugent* v. *Smith*, L. R. 1 C. P. D. 19; Id. (Ap.) 423.) **1185.**

When the carrier has given notice of the arrival of the goods at the place to which they were consigned, and the consignee does not fetch them, the liability of the carrier, as such, ceases; and he then becomes liable as an ordinary bailee; and if the goods are bulky, he is entitled to rent as a warehouseman. His liability as an insurer ceases; but he is bound to take reasonable care of the goods as a bailee. And the words "at owner's sole risk" do not exempt him from this obligation. (*Mitchell* v. *Lancashire, &c., Ry. Co.*, L. R. 10 Q. B. 256.) **1186.**

Where goods are sent by rail, "to be left till called for," there, as soon as a reasonable time for an application for delivery of the goods has passed, the responsibility of the company, as carriers, ceases, and is exchanged for that

of warehousemen; so that if they are destroyed by an accidental fire the company are not liable. (*Chapman* v. *Great Western Ry. Co.*, L. R. 5 Q. B. D. 278.) **1186a.**

If a carrier follows the usual course of business as regards delivery, and it is not inconsistent with the consignor's directions, he will not be responsible, though he deliver, at the address named by the consignors, to the order of a fictitious consignee, who has imposed on the consignors. (*M'Kean* v. *M'Ivor*, L. R. 6 Ex. 36.) **1187.**

After a refusal of the goods at the consignee's address, carriers are involuntary bailees, and are only bound to act with reasonable care and caution in regard to them. (*Heugh* v. *London & N. W. Ry. Co.*, L. R. 5 Ex. 51.) **1188.**

A common carrier of passengers only, who receives occasionally and gratuitously, and at his own option, some article of luggage for the accommodation of a passenger, is only answerable as a gratuitous bailee of such articles, and not as a common carrier of goods. This is the case with an omnibus proprietor. (Ad. Torts, 308; Chit. Con. 433.) **1189.**

If things are entrusted to a common carrier, which, from their intrinsic value or their destructible nature, require peculiar care, but

the carrier is not apprised of that fact, he is bound only to take that ordinary care of the things which their general appearance seemed to require. (Ad. Torts, 309; Chit. & Tem. on Car. 10, 49, 50.) **1190.**

Dangerous articles.

If a person employs a carrier to convey a dangerous article, he is bound to acquaint the carrier with the dangerous nature of the article: otherwise he will be answerable for any accident arising from it to the carrier or those who are concerned in the carriage of it. (*Farrant* v. *Barnes*, 11 C. B. (N. S.) 553.) **1191.**

By the stat. 29 & 30 Vict. c. 69, it is enacted that "no person shall deliver any goods which are specially dangerous to any warehouse owner or carrier, or send or carry or cause to be sent or carried any such goods upon any railway or in any ship to or from any part of the United Kingdom, or in any other public conveyance, or deposit any such goods in or on any warehouse or quay, unless the true name or description of such goods, with the addition of the words "specially dangerous," is distinctly written, printed, or marked on the outside of the package, nor, in the case of delivery to or deposit with any warehouse owner or carrier, without also giving notice in writing to him of the

name or description of such goods, and of their being specially dangerous." (s. 3.) (*a*) **1192.**

"And no warehouse owner or carrier shall be bound to receive or carry any goods which are specially dangerous." (s. 6.) **1193.**

And "in construing this Act the term warehouse owner shall include all persons or bodies of persons owning or managing any warehouse, store, quay, or other premises in which goods are deposited: and the word carrier shall include all persons or bodies of persons carrying goods or passengers for hire by land or water." (s. 7.) **1194.**

Valuable or special articles.

In consequence of the Carriers Act, 11 Geo. IV. & 1 Will. IV. c. 68, no common carrier by land is liable for the loss of, or injury to, gold or silver, plated articles, precious stones, jewellery, watches, clocks, trinkets, bills, notes, securities, stamps, maps, writings, pictures, glass, china, silks, furs, or lace, when the value exceeds 10*l.*; unless the value and nature of such articles has been expressly declared at the time of delivery to the carrier, and the increased charge for care, notified in the office of such carrier, or an engagement to pay it, shall have been

(*a*) A breach of this enactment may render the offender liable to a heavy penalty or imprisonment. (s. 4.)

accepted by the person receiving the parcel. And he is entitled to this exemption from liability, notwithstanding a special contract, unless such contract contains anything inconsistent with that exemption. This Act, however, does not protect any such common carrier, when he does not notify or does not demand the increased charge; nor does it protect him from liability to answer for loss or injury resulting from his own misfeasance, or from the felonious acts of any servant in his employ, or protect the servant himself from any liability ex delicto. The carrier must, if required, give a receipt for the amount paid for the carriage. But he is not concluded, as to the value of any parcel, by the value declared. (Broom Com. 794; 2 Ste. Com. 85; Chit. & Tem. on Car. 47–8, 56; Selw. 447–9; Rosc. 427–8; Ad. Con. 489–490; Chit. Con. 444–8; 11 Geo. IV. & 1 Will. IV. c. 68, s. 1–3, 8, 9; *Behrens* v. *Great Northern Ry. Co.*, 6 Hurl & Norm. 366; *Baxendale* v. *Great Eastern Ry. Co.*, L. R. 4 Q. B. (Ex. Ch.) 244; *Anderson* v. *London & N. W. Ry. Co.*, L. R. 5 Ex. 90: *Whaite* v. *Lancashire, &c., Ry. Co.*, L. R. 9 Ex. 67; *Morritt* v. *North Eastern Ry. Co.*, L. R. 1 Q. B. D. (Ap.) 302.) **1195.**

In an action against a railway company,

for loss of goods, upon an issue that the loss arose from the felonious acts of the defendants' servants, and therefore that they were not protected by the above enactment in the Carriers Act (though the goods were worth more than 10*l.*, and the value was not declared), it is sufficient to prove facts which render it probable that a felony was committed by some one or other of the defendants' servants: it is unnecessary to give such evidence as would suffice to convict a particular servant. (*Vaughton* v. *London & N. W. Ry. Co.*, L. R. 9 Ex. 93; *M'Queen* v. *Great Western Ry. Co.*, L. R. 10 Q. B. 569.) **1196.**

As to parcels or packages of lace delivered after the 30th of September, 1865, the term "lace" does not include machine-made lace. (28 & 29 Vict. c. 94.) **1197.**

Limiting liability by notice, contract, or conditions.

Carriers cannot, by the mere effect of a public notice, limit their liability at Common Law to answer for the loss of any articles other than those enumerated in the Carriers Act. (Sm. Merc. Law, 291; 2 Ste. Com. 84; Ad. Torts, 310; Chit. & Tem. on Car. 60, 63, 77, 79; 1 Selw. 448; Rosc. 424, 428; Ad. Con. 6th ed. 472; Chit Con. 8th ed. 454-5; 11 Geo. IV. & 1 Will. IV. c. 68, s. 4.) **1198.**

A carrier may, however, enter into a special

contract, limiting his liability. (Chit. Con. 8th ed. 446, 454–5; Ad. Con. 6th ed. 475; *Peninsular & Oriental Co.* v. *Shand*, 3 Moo. P. C. (N. S.) 272, 293; *Scaife* v. *Farrant*, L. R. 10 Ex. (Ex. Ch.) 358.) And as to the carriage of such articles as he does not publicly profess to carry, or such as are attended with peculiar inconvenience or risk (such as living animals, alabaster, toys, furniture, &c.), he may, by a special contract, in express and unambiguous terms, throw the entire risk on the owner, even notwithstanding the negligence of himself or his servants. (Chit. & Tem. on Car. 60, 63, 77–80; Selw. 450; Sm. Merc. Law, 293; Ad. Con. 6th ed. 477–9; Chit. Con. 435; Rosc. 424; 11 Geo. IV. & 1 Will. IV. c. 68, s. 6.) And a carrier may enter into a special contract as to the carriage of articles of the value of upwards of 10*l.*, at the ordinary rate, and on the terms of a limited responsibility. (Ad. Torts, 314–315; Chit. & Tem. on Car. 77; Chit. Con. 6th ed. 476.) **1199.**

Railway and canal companies are liable for loss or injury to goods or other things on their own lines, or on lines worked by them, occasioned by the negligence or default of such companies or their servants, notwithstanding any notice, condition, or declaration,

made or given by such companies, contrary thereto, or limiting such liability. The company, however, may make such conditions as to receiving, forwarding, and delivering goods or animals as the Court or judge before whom any question relative thereto is held, may deem just and reasonable. And the company will not be answerable in more than a certain sum for certain animals, unless notice be given that they are of higher value, and an increased sum be paid for them. No special contract between the company and any other party limiting their liability for loss or damage on their own line, or lines worked by them, will be binding upon them unless signed by him or by the person delivering the property. (17 & 18 Vict. c. 31, s. 2, 7; Sm. Merc. Law, 294–5; Ad. Torts, 317; Chit. & Tem. on Car. 70–72, 79; Ad Con. 6th ed. 480; Chit. Con. 8th ed. 446, 448, 460; Rosc. 430–431. See *Harrison* v. *London, B. &c., Ry. Co.*, 2 Best & Sm. 122; *Garton* v. *Bristol & Exeter Ry. Co.*, 1 Best & Sm. 112; *Beal* v. *South Devon Ry. Co.*, 5 Hurl. & Norm. 875; *Lewis* v. *Great Western Ry. Co.*, 5 Hurl. & Norm. 867; *Aldridge* v. *Great Western Ry. Co.*, 15 C. B. (N. S.) 582; *Peek* v. *North Staffordshire Ry. Co.*, 10 H. L. Cas. 473; *Beal* v. *South Devon Ry. Co.*, 3 Hurl. &

Colt. 337; *Hodgman* v. *West Midland Ry. Co.*, 5 Best & Sm. 173; *Allday* v. *Great Western Ry. Co.*, 5 Best & Sm. 903; *Rooth* v. *North Eastern Ry. Co.*, L. R. 2 Ex. 173; *Lord* v. *Midland Ry. Co.*, L. R. 2 C. P. 339; *Martin* v. *Great Ind. Peninsular Ry. Co.*, L. R. 3 Ex. 9; *Zunz* v. *South Eastern Ry. Co.*, L. R. 4 Q. B. 539; *Kent* v. *Midland Ry. Co.*, L. R. 10 Q. B. 1.) **1200.**

Where goods are carried at a lower rate "at owner's risk," that does not exempt the company from liability for negligence by which damage is caused, but only from the ordinary risks incurred by goods in going along the rail. (*D'Arc* v. *London & N. W. Ry. Co.*, L. R. 9 C. P. 325.) (*a*) **1201.**

(*a*) The decision in *Lewis* v. *Great Western Ry. Co.* by the Court of Appeal, affirming the decision of the Judge on Circuit, L. R. 3 Q. B. D. 195, appears to the writer clearly wrong, and productive of the most flagrant injustice, as well as opposed to *D'Arc* v. *London & N. W. Ry. Co.*, decided by Lord Coleridge, L.C.J., Brett, J., and Denman, J. One hundred and fifty-six Cheshire cheeses, of different sizes, weighing nearly four tons, were forwarded from London, "at owner's risk," by desire of plaintiff, at the lower rate of 40*s.* a ton, instead of the ordinary rate of 60*s.* a ton. They were packed in one truck, in two tiers, one above the other; whereas, as Cheshire cheeses, they ought to have been packed flat, and in single layers, in three trucks. By this mode of packing, and the heat of the weather, they were broken to pieces. The company were expressly to be liable for wilful misconduct on the part of the company's servants.

The Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), s. 7, applies to passengers' luggage, both as regards the reasonableness of a condition and the contract containing it being signed. And by the Regulation of Railways Act (31 & 32 Vict. c. 119, s. 16), the provisions of s. 7 of the former Act are extended to traffic carried on by steam vessels and by railway companies. (*Cohen* v. *South Eastern Ry. Co.*, L. R. 1 Ex. D. 217; 2 Ex. D. (Ap.) 253; *Ashenden* v. *London, Brighton, & S. C. Ry. Co.*, L. R. 5 Ex. D. 190.) **1202.**

The Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31, s. 7), does not apply to loss or damage on lines which do not belong to or are not worked by the company entering

Those who packed the cheeses in London were not aware of the usual mode of packing Cheshire cheeses, though they were usually packed in the latter way in the counties of Salop and Chester. The Court found that there was no wilful misconduct on the part of the servants, and decided that the company were not liable. With great deference, the author is of opinion that there was an implied indispensable condition that the packers or the directing servants of the company (whether the station-master or some other person) should both know the proper mode of packing, and see it carried out; and that the clause as to "owner's risk" did not touch the case. This was no case of accident in going along the rail, but of culpable ignorance (to say the least) of the proper mode of conducting their own business, which, as common carriers, the company were bound both to know and to adopt.

into the contract. And therefore where a passenger takes a through ticket from an English railway, to a place on the continent, and on the ticket is printed a condition that the company are not responsible for loss or injury except on their own line, the passenger cannot claim for loss on a continental line, though he did not sign the ticket. (*Zunz* v. *South Eastern Ry. Co.*, L. R. 4 Q. B. 539.) **1203.**

The condition against responsibility "off the Company's lines" means not merely "off or not on their lines," but "out of their custody;" so that it does not apply to luggage taken from one company's line to another company's line, across a station, of which, and of the porters of which, the former have the use. (*Kent* v. *Midland Ry Co.*, L. R. 10 Q. B. 1.) **1204.**

Carriage of parcels beyond limits.

When a common carrier receives a parcel addressed to a place beyond the limits of his customary journey, and he does not expressly limit his responsibility to his customary journey, he is responsible for the whole distance, though he may have forwarded the goods by another carrier. And this rule applies to railways. (Ad. Torts, 320; Chit. & Tem. on Car. 23–88, 128; Rosc. 425; Ad. Con. 499.) **1205.**

Responsibility of carriers of passengers.

Every carrier of passengers for hire is answerable for the least want of forethought, skill, or care in himself or his servants and agents, and for any accident arising from the discoverable defectiveness of his conveyance, horses, or equipments, but not for unforeseen misfortunes which forethought, skill, and care could not have prevented, or which arose immediately from the fault of the passenger himself. (Ad. Torts, 238–240; Chit. & Tem. on Car. 256–8, 264–8; Chit. Con. 451–3; Ad. Con. 483; *John* v. *Bacon*, L. R. 5 C. P. 437.) He is not an insurer, like a carrier of goods; and hence he is not liable for a latent defect, which no care or skill could have detected, either in the manufacture, purchase, or use. (*Readhead* v. *Midland Ry. Co.*, L. R. 2 Q. B. 412; 4 Q. B. (Ex. Ch.) 379.) **1206.**

Responsibility of railway companies in cases of accident.

If a railway engine is driven at an unusual and dangerous speed, or any accident arises from the defectiveness of the engines, carriages, rails, or works, or from the defective state of the fences, in consequence of which cattle have strayed on the line, or from negligence or unskilfulness on the part of the company or their servants, or the want of anything necessary for the safety of the passengers, the railway company are responsible for all damages and injuries which the

passengers sustain through these causes, though there may have been contributory negligence or fault on the part of third persons. And a company undertaking to carry passengers over another line are answerable for negligence happening on it as much as if it happened on their own line. So that a railway company are liable to a passenger for an accident caused by negligence of another company over whose line they have running powers. (Ad. Torts, 239–240; Chit. & Tem. on Car. 257; *Fordham* v. *London, Brighton, & S. C. Ry. Co.*, L. R. 3 C. P. 368; 4 C. P. (Ex. Ch.) 619; *Buxton* v. *North Eastern Ry. Co.*, L. R. 3 Q. B. 549; *Thomas* v. *Rhymney Ry. Co.*, L. R. 5 Q. B. 226; 6 Q. B. (Ex. Ch.) 266; *Jackson* v. *Metropolitan Ry. Co.*, L. R. 10 C. P. 49; affirmed, 2 C. P. D. 125; reversed, 3 Ap. Cas. 193; *Foulkes* v. *Metrop. District Ry. Co.*, L. R. 4 C. P. D. 267; 5 C. P. D. (Ap.) 157.) **1207.**

But where a passenger has a free pass, on the terms of travelling at his own risk (as in the case of a drover accompanying cattle), the company are not liable for an accident, whether in actually travelling or in coming away. (*M'Cawley* v. *Furness Ry. Co.*, L. R. 8 Q. B. 57; *Gallin* v. *London & N. W. Ry. Co.*, L. R. 10 Q. B. 212.) **1208.**

If passengers are invited to alight when it is dangerous for old and infirm persons or women to do so without aid, and no aid is at hand, and they are in fear of being carried on, the company are responsible for any accident which happens to them in alighting. (*Robson* v. *North Eastern Ry. Co.*, L. R. 10 Q. B. 271; affirmed L. R. 2 Q. B. D. 85.) If, however, a train or a part of it, overshoots a platform, or does not come far enough, from being too long, or from some other cause, and a passenger, in getting from it, is injured, the company are not liable, if he does not use the footboard, or call to the officials present to bring the steps, or to back or advance the train, or otherwise to assist him, but injures himself by getting down. (*Siner* v. *Great Western Ry. Co.*, L. R. 4 Ex. (Ex. Ch.) 117.) **1209.**

Neither a porter's calling out the name of the station, nor stopping the train at a station, amounts of itself, nor do both combined amount, to an invitation to a passenger to alight, unless he is opposite the platform, and there is no cause of danger or none that is apparent to a casual observer at a glance. (*Bridges* v. *North London Ry. Co.*, L. R. 6 Q. B. (Ex. Ch.) 377; 7 H. L. 213; *Cockle* v. *London & S. E. Ry. Co.*, L. R. 5 C. P. 457;

7 C. P. (Ex. Ch.) 321; *Lewis* v. *London, Chatham, & Dover Ry. Co.*, L. R. 9 Q. B. 66; *Robson* v. *North-Eastern Ry. Co.*, L. R. 10 Q. B. 271; affirmed, 2 Q. B. D. 85.) **1210.**

But if the train has come to a permanent stand at a station, and no sufficient warning is given to the passengers not to alight, and there is no danger, or, from the want of light or otherwise, a cause of danger would not be apparent to a casual observer at a glance, the company will be liable, if a passenger sustains an injury in getting out. (*Cockle* v. *London & S. E. Ry. Co.*, L. R. 5 C. P. 457; 7 C. P. (Ex. Ch.) 321: *Weller* v. *London, Brighton, & S. C. Ry. Co.*, L. R. 9 C. P. 126; *Bridges* v. *North London Ry. Co.*, L. R. 7 H. L. 213; *Robson* v. *North-Eastern Ry. Co.*, L. R. 10 Q. B. 271; affirmed, L. R. 2 Q. B. D. 85.) **1211.**

Responsibility of railway companies for luggage.

Railway companies are responsible for the conduct of their servants in regard to passengers' luggage, and for its safe delivery into the hands of the passenger or his agent or servant, unless they are expressly exempted by their special Acts of Parliament. Thus, the company are responsible for luggage delivered to one of their servants that it may be labelled and placed in the luggage van, and for luggage openly taken by a passenger

into the same carriage with himself; and the company's responsibility will continue until the porters have placed the luggage, at the end of the journey, on the vehicles by which it is to be taken away, unless the passenger accepts a shorter delivery, or the porter was specially employed by the passenger to convey the luggage to the vehicle. (Ad. Torts, 322; Broom Com. 803–4; Chit. & Tem. on Car. 287; 1 Selw. 445; Rosc. 426; Ad. Con. 495; Chit. Con. 440.) **1212.**

It is the duty of a railway company to have the passengers' luggage ready for delivery upon the platform at the usual place of delivery until the owner, in the exercise of due diligence, can ask for and receive it; and it is the owner's duty to ask for and remove it within a reasonable time. (*Patschieder* v. *Great Western Ry. Co.*, L. R. 3 Ex. D. 153.) **1212a.**

But where a passenger's luggage is placed by him, or by the company's servants at his request, in the carriage in which he is travelling, and so out of the immediate and active control of the company's servants, instead of being in the luggage van, where it would be under such control, the company's contract to carry it safely is subject to an implied condition that the passenger shall

take such reasonable care of it as might be expected from an ordinarily prudent man; and that the company shall only be liable for loss or injury caused by the negligence of the company or their servants. (*Talley* v. *Great Western Ry. Co.*, L. R. 6 C. P. 44.) (*a*).

1213.

(*a*) This was decided by the Court of Appeal (Bramwell, Brett, and Cotton, L.JJ.); even in a case where the jury found that the railway carriage, and not the luggage van, was the proper place to put a missing bag (having regard to the common usage of the company at the station);—that the porter put the bag into the carriage, while the plaintiff went to the refreshment room, as the train was not to start for a few minutes;—that the plaintiff asked the porter to take charge of the luggage, and the porter turned the key, and said it would be all right, and said he would look after the luggage;—that the porter was acting within the scope of his employment, as the servant of the company, and took charge of the bag as their servant;—and that there was no negligence on the part of either plaintiff or defendants. (*Bergheim* v. *Great Eastern Ry. Co.*, 3 C. P. D. (Ap.) 221.)

This decision appears to the writer to be wrong, and it is one of the most extensive application and importance. It was proved that by the usage of the company the porter, as their servant, put the dressing bag into the proper place; and it was admitted by the judgment that the company would be liable for negligence in regard to luggage so placed; and yet the bag having been locked in the carriage, and the porter having promised to take charge thereof, it could only be lost by the negligence of that porter in not looking after the luggage, which he had undertaken to do, and thereby led the plaintiff to trust to him for a short and reasonable time. If that porter was absolutely required elsewhere, and some other person unlocked the door in the meantime, and if the bag was

If a passenger by rail takes with him articles which are not personal luggage, and the company are not paid for carrying them, and their servants are not aware of their nature, the company are not responsible for the articles, if lost. (*Cahill* v. *London & N. W. Ry. Co.*, 10 C. B. (N. S.) 154; 13 C. B. (N. S.) 818; *Belfast, &c., Rys. Co.* v. *Keys*, 9 H. L. Cas. 556; *Phelps* v. *London & N. W. Ry. Co.*, 19 C. B. (N. S.) 321; *Hudston* v. *Midland Ry. Co.*, L. R. 4 Q. B. 366.) **1214.**

Passenger luggage or personal luggage would seem to be luggage which it is only consistent with the reasonable convenience of the public and the railway companies should be taken by passengers in general, or by passengers of a given description. Thus, it would include not only clothes and other

stolen by some unknown person, as was found by the jury, that would only show that the train was inadequately supplied with servants (as too often is the case), which was great negligence. It did not exempt the company from proper care. According to this judgment, not only are previous decisions overruled, but in effect the passengers must adopt the unusual and most inconvenient course of having all their luggage, great and small, labelled for the van, thereby vastly increasing the work, delay, confusion, and risk of loss of luggage. Or they must encounter the risk of robbery from the carriage, the admitted most proper place for such luggage as that in question. Or the refreshment rooms, the water-closets, and the urinals must be regarded as virtually closed.

things which are commonly taken for personal use on a journey, but also those articles purchased by passengers, which, as a matter of convenience or safety, most passengers would take with them from the places where they had bought them, and which could be taken without greater inconvenience to the railway company or other passengers than other ordinary personal luggage. It would also include samples taken by commercial travellers, up to a certain weight and size, guns of sportsmen, rifles of soldiers, militia, and volunteers, books of judges of assize or judges of County Courts or of counsel and solicitors attending courts. But it would not include such a thing as a rocking-horse purchased by a passenger. (On this subject see *Macrow* v. *Great Western Ry. Co.*, L. R. 6 Q. B. 612.) **1215.**

For articles deposited in their cloak room a railway company are not responsible, as common carriers, but as ordinary bailees, subject to the terms of their printed notices. (*Van Toll* v. *South Eastern Ry. Co.*, 12 C. B. (N. S.) 75; *Harris* v. *Great Western Ry. Co.*, L. R. 1 Q. B. D. 515 (*a*). See supra, par. 1032–4.) **1216.**

(*a*) To this extent this case is an authority. But it is no reliable authority for the proposition that a railway

Although there be no privity of contract between a person and a railway company, yet he may sue the company for an injury done

Action of tort against a railway company.

company is not liable for luggage beyond the value of 5*l.*, if not declared to be so, and delivered to their cloak room, but never placed there. The view of Mr. Justice Lush, in affirmance of that of Baron Pollock, seems clearly the correct one. There were only two judges who decided the case, and one of those did so with considerable hesitation.

In the House of Lords, it was decided in a Scotch case, that the recipient of a ticket is not bound to read conditions on the back of it to which there is no reference on the face of it. (*Henderson* v. *Stevenson*, L. R. 2 H. L. Sc. 470.) But where there is enough on the face of it, or in the nature of the case, to lead him to read the part on which a condition is printed, the recipient is bound to read the condition. (*Burke* v. *South Eastern Ry. Co.*, L. R. 5 C. P. D. 1.)

On this subject see also *Parker* v. *South Eastern Ry. Co.*, and *Gabell* v. *South Eastern Ry. Co.*, L. R. 1 C. P. D. 618; 2 C. P. D. (Ap.) 416 (virtually but one case), which (from the nature of the case) is of no value except as illustrative of the mischief and absurdity of the jury system in civil cases (even in the High Court) in which the extreme liability to difference of opinion, as regards the right questions to be submitted to the jury, is a frequent source of repeated litigation, expense, and disappointment of justice. Many jurymen are great and unnecessary losers by absence from their business, and are often made the instruments of iniquity by the partiality or wrong-headedness of one or more of them, or by the misrepresentation of advocacy. For hundreds of years, a vast amount of property, often depending on matters of fact, was disposed of in Chancery by a single judge without a jury. And the writer submits that, in civil cases, there should be no jury, except by leave or direction of the judge, on special grounds,—at any rate, not under a considerable amount sufficient to make it worth the trouble and loss.

to his luggage or goods through the negligence of their servants, whilst the same were in their custody. (*Martin* v. *Great Indian Peninsular Ry. Co.*, L. R. 3 Ex. 9.) **1217.**

Party to sue carrier.

The owner, whether he is consignor or consignee, is generally the person to sue the carrier for the loss or injury of the goods. (Ad. Con. 503; Chit. Con. 449, 450.) **1218.**

Duty of a ferryman.

A common ferryman is answerable for any neglect in providing proper means for the safe transit of persons, and their carriages, horses, and goods. (Ad. Torts, 324.) **1219.**

Definition of an innkeeper.

A common innkeeper is one who professes to supply lodgings and provisions for the night, for all comers who are ready to pay for them; by whatsoever name his establishment may be designated. But a person who professes to let private lodgings only, or to supply provisions only, is not an innkeeper. (Ad. Torts, 326; 2 Selw. 1367; 2 Ste. Com. 83; Rosc. 436; Chit. Con. 530; Ad. Con. 378–9.) **1220.**

Duty of an innkeeper.

A common innkeeper is bound to afford such accommodation as he possesses for all persons, and for the horses and goods of all persons, who are ready to pay the customary charges, and are not intoxicated, or guilty of impropriety of conduct, or suffering under a contagious or infectious disease;

and, if he does not, he is liable to an action for damages, and also to an indictment. But he is not bound to receive the goods of a person who merely desires to use the inn as a place of deposit. (Ad. Torts, 325–6; 2 Ste. Com. 83; Rosc. 436; Chit. Con. 431; Ad. Con. 378–9.) **1221.**

Liability of an innkeeper by the common law.

An innkeeper is responsible for the goods deposited by any person at his inn as a guest, when they are damaged, stolen, or lost; whether they are ordinary traveller's luggage, or other articles, such as a piano, and whether the guest is the owner of them or not; unless he proves that the loss or damage was attributable to a want of ordinary care on the part of the guest himself, or to the act of God, or to vis major, and was not attributable to any negligence on his part. (Ad. Torts, 327–332; 2 Ste. Com. 82; Broom Com. 789; 1 Sm. L. C. 106–8; Jones Bail, 94; 2 Selw. 1367; Rosc. 436; Chit. Con. 430–1; *Morgan* v. *Ravey*, 6 Hurl. & Norm. 265; *Day* v. *Bather*, 2 Hurl. & Colt. 14; *Oppenheim* v. *White Lion Hotel Co.*, L. R. 6 C. P. 515; *Threfall* v. *Borwick*, L. R. 7 Q. B. 711; affirmed, 10 Q. B. (Ex. Ch.) 210.) **1222.**

If a guest negligently leaves money or valuables in rooms of common resort, the

innkeeper is not responsible for their safety. (Ad. Torts, 331; 1 Sm. L. C. 107-8; Rosc. 436.) **1223.**

If an innkeeper takes charge of goods for a person who is not lodging at the inn at all, or is lodging there as a lodger, and not as a traveller and guest, the innkeeper is only responsible in the first case as a bailee, and in the second case as a lodging-house keeper. (Ad. Torts, 331–2; Broom Com. 789; 1 Sm. L. C. 109.) **1224.**

Statutory limitation of his liability.

And by the stat. 26 & 27 Vict. c. 41, "No innkeeper shall, after the passing of this Act, be liable to make good to any guest of such innkeeper any loss of or injury to goods or property brought to his inn, not being a horse or other live animal, or any gear appertaining thereto, or any carriage, to a greater amount than the sum of 30*l.*, except in the following cases; (that is to say,) (1.) Where such goods or property shall have been stolen, lost, or injured, through the wilful act, default or neglect of such innkeeper or any servant in his employ (*a*); (2.) Where such goods or property shall have been deposited expressly for safe custody with such innkeeper: provided always, that in the case of such deposit it shall be lawful for such inn-

(*a*) *Spice* v. *Bacon*, L. R. 2 Ex. D. (Ap.) 463.

keeper, if he think fit, to require as a condition of his liability, that such goods or property shall be deposited in a box or other receptacle, fastened and sealed by the person depositing the same." (s. 1.) **1225.**

"If any innkeeper shall refuse to receive for safe custody, as before mentioned, any goods or property of his guest, or if any such guest shall, through any default of such innkeeper, be unable to deposit such goods or property as aforesaid, such innkeeper shall not be entitled to the benefit of this Act in respect of such goods or property." (s. 2.) **1226.**

Notice of law to be conspicuously exhibited.

"Every innkeeper shall cause at least one copy of the first section of this Act, printed in plain type, to be exhibited in a conspicuous part of the hall or entrance to his inn, and he shall be entitled to the benefit of this Act in respect of such goods or property only as shall be brought to his inn while such copy shall be so exhibited." (s. 3.) **1227.**

Lien

If an innkeeper receives an article, though it be not ordinary travellers' luggage, as belonging to his guest he has a lien upon it: as in the case of a piano, though only hired. His lien is co-extensive with his liability. (*Threfall* v. *Borwick*, L. R. 7 Q. B. 711; 10 Q. B. (Ex. Ch.) 210.) **1228.**

PART III. TIT. III. CAP. III.

By the stat. 41 & 42 Vict. c. 38 (8th August, 1878), it is enacted as follows:—

Landlord, &c., may dispose of goods left with him after six weeks.

"The landlord, proprietor, keeper, or manager of any hotel, inn, or licensed public-house shall, in addition to his ordinary lien, have the right absolutely to sell and dispose by public auction of any goods, chattels, carriages, horses, wares, or merchandise which may have been deposited with him or left in the house he keeps, or in the coach-house, stable, stable-yard, or other premises appurtenant or belonging thereunto, where the person depositing or leaving such goods, chattels, carriages, horses, wares, or merchandise shall be or become indebted to the said innkeeper either for any board or lodging or for the keep and expenses of any horse or other animals left with or standing at livery in the stables or fields occupied by such innkeeper. **1228a.**

"Provided that no such sale shall be made until after the said goods, chattels, carriages, horses, wares, or merchandise shall have been for the space of six weeks in such charge or custody or in or upon such premises without such debt having been paid or satisfied, and that such innkeeper, after having, out of the proceeds of such sale, paid himself the amount of any such debt, together with the costs and

expenses of such sale, shall on demand pay to the person depositing or leaving any such goods, chattels, carriages, horses, wares, or merchandise the surplus (if any) remaining after such sale: Provided further, that the debt for the payment of which a sale is made shall not be any other or greater debt than the debt for which the goods or other articles could have been retained by the innkeeper under his lien. **1228b.**

"Provided also, that at least one month before any such sale the landlord, proprietor, keeper, or manager shall cause to be inserted in one London newspaper and one country newspaper circulating in the district where such goods, chattels, carriages, horses, wares, or merchandise, or some of them, shall have been deposited or left, an advertisement containing notice of such intended sale, and giving shortly a description of the goods and chattels intended to be sold, together with the name of the owner or person who deposited or left the same where known." (s. 1.) **1228c.**

"This Act may be cited as the Innkeepers Act, 1878." (s. 2.) **1228d.**

Damages in actions against carriers and innkeepers.

In actions against common carriers for refusing to carry a passenger or goods, or for delay in delivering goods, or against inn-

keepers for refusing to provide accommodation, substantial damages are recoverable for the injury to the plaintiff's right; and if he has been put to expenses in consequence of the refusal or delay, all such expenses are also recoverable. And special damages may be claimed for more than ordinary injury arising from the refusal or delay, unless the plaintiff, though he knew that such injury might arise, did not warn the carrier or innkeeper of it. (Ad. Torts, 342–3; Ad. Con. 379; Chit. & Tem. on Car. 56; Rosc. 434; *Great Western Ry. Co.* v. *Redmayne*, L. R. 1 C. P. 329; *Woodger* v. *Great Western Ry. Co.*, L. R. 2 C. P. 318.) **1229.**

Rights and obligations of lodging-house keepers and lodgers.

There is an implied warranty on the part of persons who let furnished houses or lodgings, that they are reasonably fit for occupation; and, unless otherwise agreed, such persons are under an obligation to supply and permit the use of such things as are necessary for the occupation of such houses or lodgings. (Ad. Con. 375–6; Woodf. 173–4.) **1230.**

Wear and tear.

The occupier of a furnished house or lodgings is not responsible for deterioration by ordinary wear and tear, in the reasonable use of the property of the landlord or lodging-house keeper. (Ad. Con. 377.) **1231.**

Responsibility of a lodging-house keeper.

A lodging-house keeper is bound to take that degree of care for the protection of his house and of the property of his lodgers in it, and to use that degree of caution in the choice of his servants, which a prudent housekeeper would ordinarily take and use. But having done this, he is not responsible for the loss of the property of his lodgers, even by the theft of his own servants, unless it has been delivered over to him for safe custody. (Ad. Con. 376; Ad. Torts, 333; Broom Com. 790; Woodf. 174.) **1232.**

Distraining goods of lodger.

Before the stat. 34 & 35 Vict. c. 79, the goods of the lodger might be distrained for the rent of the lodgings. (Ad. Con. 377; Woodf. 173, 377.) But, as we have seen, some important enactments have been made by that Act for the protection of such goods. (See supra, par. 479–481a.) **1233.**

Duration of tenancy in the case of lodgings.

The duration of the tenancy in the case of lodgings ordinarily corresponds with the time for the payment of rent; so that, for example, if the rent is payable weekly, the presumption is that the hiring is for a week. (Ad. Con. 377.) **1234.**

Notice to quit lodgings.

If the tenancy is for a definite period, as for a month or a week, no notice to quit is necessary. But if the tenancy is from month to month, a month's notice is necessary; if

from week to week, a week's notice is in general necessary by custom or usage. Where no such custom or usage exists, a reasonable notice is sufficient. And the notice must expire at the end of the current term of hiring. Where the requisite notice is not given, the rent for the period for which notice ought to have been given must be paid. (See Ad. Con. 6th ed. 358–9; Chit. Con. 8th ed. 327; Woodf. 174.) **1235.**

General law as to lodgers.

Lodgers are in general subject to the same rules as other tenants. (Woodf. 174.) **1236.**

PART IV.

OF THE ENFORCEMENT OF PRIVATE RIGHTS, AND THE REDRESS OF, AND PROTECTION FROM, PRIVATE WRONGS OR CIVIL INJURIES.

Damnum absque injuriâ
Injuria sine damno

PRELIMINARY REMARKS.

Damnum absque injuriâ.

It is a maxim that damnum absque injuriâ is not actionable. **1237.**

Damnum.

Damnum is such a damage, whether pecuniary or perceptible, or not, as is capable, in legal contemplation, of being estimated by a jury. **1238.**

Injuria.

Injuria is a legal wrong, that is, an act or omission of which the law takes cognizance as a wrong. **1239.**

Hence the meaning of the maxim is, that loss or detriment is not a ground of action, unless it is the result of a species of wrong of which the law takes cognizance. **1240.**

But it must not be conclusively assumed from the mere fact of there having been no cases, that the law will not take cognizance of a right or wrong. On the subject of this paragraph, see *Day* v. *Brownrigg*, L. R. 10 Ch. D. (Ap.) 294; in which the decision of the Vice-Chancellor Malins was reversed, but, as the writer humbly submits, contrary to common sense, right reason, natural justice, law, and equity. **1240a.**

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Injuria sine damno.

Nor is injuria sine damno a sufficient ground of action, if damnum is understood in the technical sense above mentioned. But if damnum is taken in the sense of an actual perceptible loss in the particular case, injuria sine damno may be a ground of action. For an action may be maintained for a legal wrong, though unaccompanied, in the particular instance, with any actual perceptible or appreciable loss or detriment. Thus injuria sine damno (in this last sense) will form a ground of action when a private legal right is violated, though the violation of it be unattended with any actual perceptible or appreciable loss or detriment in the particular case. (See Broom Com. 72, 82–90; *Lamb* v. *Walker*, L. R. 3 Q. B. D. 389.) **1241.**

Ashby vs. White, others case.

The result is, that there are moral wrongs for which the law gives no legal remedy, though they cause great loss or detriment: and, on the other hand, there are legal wrongs for which the law does give a legal remedy, though there be only a violation of a private right, without actual loss or detriment in the particular case. **1242.**

Division of rights and wrongs, into those founded in contract,

Some rights are founded in contract; others are independent of contract. And some wrongs consist of a violation of con-

tract, express or implied; others are infringements of rights, or violations of duty, independent of contract. The latter are termed torts. (Broom Com. 633, 652-3, 826–8.) **1243.**

and those independent of contract.

The same transaction may be a breach of contract, a tort, and a crime. And accordingly, when it does not amount to a felony, redress may be obtained, first, by an action ex contractu, when it may be viewed as a breach of contract; or, secondly, by an action ex delicto, when it may be viewed as a tort; or, thirdly, by an indictment, when it may be viewed as a crime. In the first case, the plaintiff is said to sue or recover in contract; in the second case in tort. (See Broom Com. 652–3, 827. And see infra, par. 1299, et seq.) **1244.**

Transactions which have a contractive, a tortious, and a criminal aspect.

Before the person injured by any felonious act can seek civil redress, the matter must be heard and disposed of (by acquittal or conviction) before the proper criminal tribunal, in order that the justice of the country may be first satisfied. (Ad. Torts, 4th ed. 31; Broom Com. 97–8; *Wellock* v. *Constantine*, 2 Hurl. & Colt. 146.) **1245.**

Every person who does a wrong, is at least responsible for all the mischievous consequences that might reasonably be expected

Responsibility for consequences of tort.

PART IV.

to result under ordinary circumstances from such misconduct. (Broom Com. 667.)

1246.

Redressing one wrong by another.

As a general rule, a person may not redress a wrong by doing a wrong to him who has done the wrong sought to be redressed. (*Ibottson* v. *Peat*, 3 Hurl. & Colt. 644.)

1247.

TITLE I.

OF THE ENFORCEMENT OF RIGHTS, AND THE REDRESS OF AND PROTECTION FROM WRONGS, BY THE MERE ACT OF THE PARTIES, OR BY THE MERE OPERATION OF LAW.

I. THERE are three modes in which private injuries are *prevented* by a mere personal act; namely, defence, stoppage in transitu, and countermand of a delivery order or dock warrant. **1248.**

I. Prevention of wrong by mere personal act.

1. The defence, even by force, of oneself, or the mutual and reciprocal defence of such as stand in the relations of husband and wife, parent and child, master and servant, is a preventive course which the law allows; and the breach of the peace which results is chargeable upon him who began the affray. But care must be taken that the resistance does not exceed the bounds of mere defence, and prevention; for then the defender would himself become an aggressor. (3 Bl. Com., quoted 3 Ste. Com. 338.) **1249.**

1. Defence.

2. Stoppage in transitu is the resumption by a vendor of the possession of goods which have been transmitted to, but have not yet

2. Stoppage in transitu.

come into the actual or constructive possession of, a purchaser, who has become insolvent. To be a subject for stoppage in transitu, the goods must be in the possession of a carrier or other forwarding agent (whether nominated by the purchaser or by the vendor), and not of an agent for custody on the part of the purchaser or of the purchaser's own servant. The vendor is not obliged to seize the goods. Notice to the carrier or other forwarding agent is sufficient. (Sm. Merc. Law, 553–4, 559, 562; Tudor Ca. on M. L. 549; Rosc. 653–7; Chit. Con. 391–2, 395; Ad. Con. 210–213; *Bolton* v. *Lancashire & Yorkshire Ry. Co.*, L. R. 1 C. P. 431; *Schotsmans* v. *Lancashire & Yorkshire Ry. Co.*, L. R. 2 Ch. Ap. 332; *Rodger* v. *The Comptoir d'Escompte de Paris*, L. R. 2 P. C. 393; *Ex parte Gibbes, In re Whitworth*, L. R. 1 Ch. D. 101; *Ex parte Barrow, In re Worsdell*, L. R. 6 Ch. D. 783; *Ex parte Rosevear China Clay Co., In re Cock*, L. R. 11 Ch. D. (Ap.) 560.) **1250.**

The mere sale of the goods while they are in transitu does not determine the transitus. (*Ex parte Golding, Davis, & Co., In re Knight*, L. R. 13 Ch. D. (Ap.) 628.) **1250a.**

3. Countermand of delivery

3. Where possession has not been actually or constructively given under a delivery

order or dock warrant, the vendor may countermand the order or warrant, if the purchaser becomes insolvent before payment. (Ad. Con. 206–8; 1 Sm. L. C. 735.) **1251.**

order or dock warrant.

II. *Redress* of private injuries by the *mere act of the parties* is of two sorts: first, that which arises from the act of the injured party; and, secondly, that which arises from the joint act of both or all the parties. **1252.**

II. Redress by the act of the parties.

1. Of redress by the *act of the injured party*, there are several modes: reception or reprisal, entry on lands, abatement or removal of nuisances, distress and seizure. **1253.**

1. Redress by act of the injured party.

(1) Reception or reprisal is the recovery, by the act of the party deprived, or his servants, of his property in goods or chattels personal, or of his wife, child, or servant. This personal recovery is allowable, provided it is not effected in a riotous or unnecessarily forcible manner, or attended with a breach of the peace or a violation of legal rights. If, therefore, a horse is taken away, and the owner finds him in a common, a fair, or a public inn, he may lawfully seize the animal; but he cannot justify breaking open a private stable, or entering

(1) Reception.

on the grounds of a third person, to take the horse, unless feloniously stolen, but must have recourse to an action. (Bl. Com., quoted 3 Ste. Com. 338–9; *Blades* v. *Higgs*, 10 C. B. (N. S.) 713.) **1254.**

(2) Entry.

(2) A remedy of the same kind, for injuries to real property, is by entry on lands, when another person, without any right, has taken possession of them; in which case the party entitled may make a formal but peaceable entry on the lands, declaring that he thereby takes possession. He may enter on any part in the same county, declaring it to be in the name of the whole; but if the lands are in different counties, he must make a distinct entry in each county. If, however, a person enters with a strong force or with violence, or if he forcibly detains after a peaceable entry, unless there has been three years' peaceable enjoyment under such entry, the magistrate may restore possession to the party put out. (Bl. Com., quoted 3 Ste. Com. 339–340.) **1255.**

(3 Abatement of nuisance.

(3) Another species of remedy by the mere act of the party injured, is the abatement or the removal of nuisances, whether public or private. (Bl. Com., quoted 3 Ste. Com. 338; Broom Com. 224–5.) **1256.**

If a man apprehends that a nuisance will

be committed, he has no right to enter upon his neighbour's land to prevent it. But he may make a peaceable entry upon and interfere with the property of the wrong-doer, so far as it may be necessary to abate a nuisance, and in the way least injurious to such wrong-doer. The occupier should, however, first be required to abate it himself; unless the nuisance causes such imminent danger to life as to render it unsafe to wait for its removal by the occupier. As to a public nuisance, it cannot be abated by a private individual; unless it injures him in some peculiar manner, distinct from that in which the public generally are affected by it; in which case he may abate it, so far as may be necessary to the enjoyment of his own rights. (Ad. Torts, 99–101; Gibbon, 401; Broom Com. 224–7; *Roberts* v. *Rose*, 4 Hurl. & Colt. 105.) **1257.**

Excessive exercise of a limited right.

The exercise of a limited right, when used to excess so as to produce a nuisance, may, if necessary, be entirely stopped, until confined within its proper limits. (Ad. Torts, 101.) **1258.**

(4) Distress.

(4) Another mode of redress by the mere act of the parties is by distraining. A distress is usually made either for rent in arrear, or for damage feasant, that is, for

for rent.

damage done. (Bl. Com., quoted 3 Ste. Com. 339.) On distress for rent, we have already made some remarks. **1259.**

Distress for damage feasant.

An owner or occupier of land may seize animals and chattels injuring or trespassing upon his land, and detain them until a fair compensation for the injury is tendered to him, unless they are under the personal care and the immediate control of some one. But he must distrain them at the time, and before they leave his land. If, however, the trespassing of cattle is owing to the fault of the owner of the land, in not fencing where he ought, and there is no default on the part of the persons in charge of the cattle, no distress can be made. (Ad. Torts, 372–3; 3 Ste. Com. 341; Gilbert, 24; *Singleton* v. *Williamson*, 7 Hurl. & Norm. 410.) **1260.**

Tender of sufficient amends before the distress makes the distress wrongful; the remedy for which is by replevin, or action for a trespass, or for the wrongful seizure and conversion of the things. Tender of sufficient amends after distress, and before, but not after, the things are impounded, (that is, put into a place of security) for the purpose of the distress, makes the detainer wrongful, for which an action will

lie for the detention of the goods. The demand of an exorbitant sum for a compensation does not exempt the person whose goods are seized from the necessity of tendering a proper compensation. (Ad. Torts, 365, 374–5, 379; Tomlin; Wharton; Rosc. 730; *Singleton* v. *Williamson*, 7 Hurl. & Norm. 747.) **1261.**

Persons impounding animals must feed them, and may either recover from the owner not more than double the value of the food, or, after seven days, and after three days' further public notice, may sell them, or one or some of them, as may be necessary, to defray the cost of their food. (5 & 6 Will. IV. c. 59; 12 & 13 Vict. c. 92; 17 & 18 Vict. c. 60.) **1262.**

A commoner may distrain the beasts of a stranger; because there is no colour of right for the act of the stranger in putting them on the common. But he cannot distrain the beasts of another commoner, whether the common is a common appurtenant or because of vicinage; because there is a colour of right for the act of such other commoner. If, however, one commoner puts more cattle on the common than he ought, he is liable to an action by one or more of the other commoners. (Ad. Torts, 62; Gil-

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bert, 21; *Cape* v. *Scott*, L. R. 9 Q. B. 269.) **1263.**

(5) Seizing of heriots and things lying in franchise.

(5) The seizing of heriots, when due on the death of a tenant, and of certain things said to lie in franchise, as waifs, wrecks, estrays, is another species of self-remedy analogous to distress for rent. (Bl. Com., quoted 3 Ste. Com. 352.) **1264.**

2. Redress by the joint act of the parties.

2. In addition to these remedies by the mere act of the party injured, there are two remedies by the *joint act of both or all the parties;* namely, accord and satisfaction, and arbitration (*a*). (Bl. Com., quoted 3 Ste. Com. 353.) **1265.**

(1) Accord and satisfaction.

(1) Accord is an agreement between the party injuring and the party injured, that the party injuring shall make satisfaction to the injured party, by doing something in lieu of some other thing which the former had failed to do; and satisfaction is the fulfilment of such agreement. (3 Ste. Com. 353; Wharton.) **1266.**

(2) Arbitration.

(2) Arbitration is the determination of a matter in dispute by a person or persons appointed for that purpose. In some cases,

(*a*) For the details of practice points on arbitration, see Redman's Law of Arbitrations and Awards, and the provisions of the Judicature Acts and Rules; and as to arbitration in County Court cases, see Pollock and Nicol on County Courts.

a single arbitrator is appointed; in other cases, two or more arbitrators are appointed; and it is provided that, if they should not agree, another person shall be called in as umpire, to whose sole judgment the matter shall be referred. **1267.**

The decision in any of these cases must be in writing, and is called an award. Though the submission to arbitration may be by word or by deed or writing, yet, these being revocable in their nature, it became the practice to enter into mutual bonds, with condition under a penalty to stand to the award or arbitration. (Bl. Com., quoted 3 Ste. Com. 354–6.) **1268.**

Real property cannot pass by a mere award. But an arbitrator may award a conveyance or release of real estate, and it will be a breach of the arbitration bond to refuse compliance. **1269.**

The parties may enter into an agreement that their submission of a matter which is the subject of litigation shall be made a rule of Court, and may insert such agreement in their submission or promise or in the condition of the arbitration bond. An award is final and conclusive, and, upon an action or other proceeding to enforce it, no objection to its validity can be made, unless the

arbitrator admits he made a mistake of fact or law, or a defect is apparent on the very face of the award, or unless there is proof, and not merely some ground of suspicion, that an award has been obtained by undue means, or the arbitrators or umpire have been guilty of improper conduct. And after the submission has been made a rule of Court, a party disobeying the award may be punished as for a contempt of Court, unless it be set aside. (3 Ste. Com. 356–8; 9 & 10 Will. III. c. 15; 17 & 18 Vict. c. 125, s. 3, 6; 21 & 22 Vict. c. 74, s. 5; *Sadler* v. *Smith*, L. R. 5 Q. B. (Ex. Ch.) 40; *Moseley* v. *Simpson*, L. R. 16 Eq. 226; *Dinn* v. *Blake*, L. R. 10 C. P. 388.) **1269a.**

In proceedings to enforce (or, it would seem, to set aside) an award, an arbitrator may be required to give evidence as to any matter of fact connected with the making of the award, so as to ascertain the history of the litigation up to the time when he proceeded to make his award; and whether he took into consideration all the matters included in the reference, and none others. But he may not be examined as to the grounds which led him to the conclusion at which he arrived in the exercise of his discretionary power, or as to what passed in

his own mind. (*Duke of Buccleuch* v. *Metropolitan Board of Works*, L. R. 5 H. L. 418.) But a mere valuer may be interrogated as to the basis of his valuation. (*Turner* v. *Goulden*, L. R. 9 C. P. 57.) **1270.**

On the question of setting aside an award, Law and Equity are governed by the same principles. (*Moseley* v. *Simpson*, L. R. 16 Eq. 226, 236.) **1271.**

Where a matter is referred to arbitration, and the costs are to be in the discretion of the arbitrator, and he gives the claimant a very much less sum than was claimed, he may make the successful party pay the costs to the unsuccessful party. (*Re Fearon and Flinn*, L. R. 5 C. P. 34.) **1272.**

Any irregularity whatever may be waived by the parties. (*Moseley* v. *Simpson*, L. R. 16 Eq. 226, 234, 236.) **1273.**

III. Redress by the operation of law.

III. The remedies for private wrongs effected by the *mere operation of law* are two; retainer and remitter. **1274.**

1. Retainer.

1. Retainer is the retaining or paying himself, by a creditor who is executor or administrator to his debtor. The law allows such creditor to retain so much as will pay himself, before paying any other creditors whose debts are of equal degree; on the

ground that the executor or administrator cannot, without an apparent absurdity, commence a suit against himself, as representative of the deceased, to recover that which is due to him in his private capacity. (Bl. Com., quoted 3 Ste. Com. 359.) **1275.**

2. Remitter.

2. Remitter takes place where he who has the right of entry on land, but is out of possession, afterwards obtains the possession of the land by some subsequent and of course defective title; in which case he is remitted or sent back, by operation of law, to his ancient and more certain title. The possession which he has gained by a bad title is, ipso facto, annexed to his own inherent good one; because otherwise he who has the right would be deprived of all remedy; for, as he himself is in possession of the land, there is no other person on whom he can make entry. (3 Ste. Com. 360–1; Tomlin.) **1276.**

TITLE II.

OF THE ENFORCEMENT OF RIGHTS, AND THE REDRESS OF WRONGS, AND PROTECTION FROM WRONGS, BY THE COURTS OF COMMON LAW OF GENERAL JURISDICTION.

Of what the business of the Common Law Courts consisted.

WITH the exception of their criminal jurisdiction, and their administration of the law of real property, and the jurisdiction of the Court of Exchequer in matters of revenue, the business of our Common Law Courts, before the Supreme Court of Judicature Act, 1873, might be arranged under two heads—Contracts and Torts. (Sm. Con. 1.) **1277.**

CHAPTER I.

OF ACTIONS GENERALLY.

An action defined

AN action is the ordinary mode of enforcing a legal private right, or of redressing a legal private wrong. **1278.**

Where an action may be maintained.

Where the law requires the performance of an act for the benefit of another, or forbids that which may prejudice another, though the law give no action expressly, yet the party injured by the violation of the law is nevertheless entitled to an action. But an action will not lie for the infringement of a right created by a statute which provides another remedy for such infringement. (Broom Com. 650.) **1279.**

False representation.

If a representation is made by a person, knowing it to be false, or having no ground to believe it to be true, with an intention that another person should believe and act upon it, and that person has acted upon it, and thereby suffered damage, the party telling the falsehood is guilty of fraud, though he had no interest in telling it; and he is responsible in damages in an action for deceit. (Ad. Torts, 632; Broom Com. 660. See supra, par. 194–203.) **1280.**

In an action for fraudulent misrepresentation, the plaintiff can recover damages for an injury which is the direct and natural consequence of his acting on the faith of the defendant's representations. (*Mullett* v. *Mason*, L. R. 1 C. P. 559.) **1281.**

Estoppel.

Where one person by his conduct or expressions induces another to prejudice his

position by doing or omitting anything, the former is estopped from denying that which his conduct or expressions imported. (*Knights* v. *Wiffen*, L. R. 5 Q. B. 660.) **1282.**

Injury to a right.

Whenever an act done would be evidence against the existence of a right, it is an injury to the right; and an injury to a right imports a damage for which an action will lie. (Ad. Torts, 62, 72; Broom Com. 86. See supra, par. 1237-1242.) **1283.**

Responsibility for accident or misfortune.

In general, he who has done or been the immediate cause of an injury, though it happened accidentally or by misfortune, is answerable for it. (Ad. Torts, 237; *Rylands* v. *Fletcher*, L. R. 3 H. L. 330; *Harris* v. *Mobbs*, L. R. 3 Ex. D. 268; *Crowhurst* v. *Burial Board of Amersham*, L. R. 4 Ex. D. 5.) Where one of two innocent persons must suffer, he shall suffer who occasioned the loss. (*Id.*) Thus, where a burial board planted a yew tree which grew through the railings, and a horse pasturing near was killed by the poison in the yew, the board were liable. And so where a person who has received goods without having ordered them indorses a delivery order of them to the agent of the sender (instead of sending them back to the sender direct), such person is liable to the sender, if the agent applies them to his

own use. (*Hiort* v. *Bott*, L. R. 9 Ex. 86.) But it is otherwise when the act which caused the injury was one authorized by the legislature, or one of the ordinary and proper acts of daily life. Thus, where a company has a power given them by statute to use locomotive steam engines, they are not liable for damage caused by emission of sparks from such engines, unless there was negligence in the use of them. But where a company have no such power, they are liable at Common Law for such damage, even though there have been no negligence. (See *Hammack* v. *White*, 11 C. B. (N. S.) 588; *Vaughan* v. *Taff Ry. Co.*, 5 Hurl. & Norm. 679; *Jones* v. *Festiniog Ry. Co.*, L. R. 3 Q. B. 733; *Smith* v. *London & S. W. Ry. Co.*, L. R. 5 C. P. 98; 6 C. P. (Ex. Ch.) 14.) **1284.**

Where there has been a neglect of duty, and an accident has happened, and there is a reasonable probability that the accident arose from the neglect of duty, it is a question for the jury, or, if there is no jury, for the judge sitting as a jury, to determine whether the accident did arise from the neglect of duty, and whether therefore the party guilty of the neglect of duty is responsible for the accident. (*Williams* v. *Great Western Ry. Co.*, L. R. 9 Ex. 157.) **1285.**

If an act is done upon any part of a highway which is not a part of the reasonable user of it, and which has the effect of endangering its use to others, and damage results from such act in the course of a lawful user of the highway, an action will lie for such damage. (*Harris* v. *Mobbs*, L. R. 3 Ex. D. 268, 271.) **1285a.**

Culpable ignorance of a cause of mischief.

If knowledge of the existence of a cause of mischief makes persons responsible for the injury it occasions, they are equally responsible when ignorance of its existence is attributable to their culpable negligence. (*Mersey Docks Trustees* v. *Gibbs*, L. R. 1 H. L. 93; 11 H. L. Cas. 686.) But they are not responsible for an accidental cause of mischief not attributable to their culpable negligence. (*Carstairs* v. *Taylor*, L. R. 6 Ex. 217.) **1286.**

Neglect, unwilful or unknown to person chargeable.

Where a person is injured by the neglect of another, the latter is liable, though the neglect be unwilful and unknown to him. (*Humphries* v. *Cousins*, L. R. 2 C. P. D. 239.) **1287.**

Liability of a corporate body.

A corporate body authorized to perform a public work, and to receive tolls in respect of it, is liable for injuries arising from the improper performance of the work; and the tolls must answer the liability, though the

corporate body itself derives no profit from the tolls. (*Mersey Docks Trustees* v. *Gibbs*, L. R. 1 H. L. 93; 11 H. L. Cas. 686; *Foreman* v. *Mayor of Canterbury*, L. R. 6 Q. B. 214.) **1288.**

Liability of persons for unsafe state of premises for care of which they are paid.

Where persons receive tolls or money for affording a standing place for cattle, they are primâ facie liable to the owners of the cattle, if that place is not a safe place for the purpose, as where there is a spiked railing round a statue, and a cow injures itself in attempting to jump over the fence. (*Lax* v. *Corporation of Darlington*, L. R. 5 Ex. D. (Ap.) 28.) **1288a.**

Joint tort-feasors.

Where two or more persons are liable to be jointly sued for an injury resulting from their common act, each is responsible for the entire injury. (Ad Torts, 430.) **1289.**

Negligence of the plaintiff.

A person cannot sue for an injury of which the negligence or the hazardous and needless or not absolutely needful act of himself or a person actually or constructively employed by him or acting for him has been the proximate cause. But although there may have been negligence on the part of the plaintiff, and that negligence may have contributed to the injury, yet that will not prevent his recovering in respect of the negligence of the defendant, if the defendant might by ordinary care

have avoided the injury. (Ad. Torts, 95; Broom Com. 103, 667; Rosc. 521; *Witherby* v. *Regent's Canal Co.*, 12 C. B. (N.S.) 2; *Skelton* v. *London & N. W. Ry. Co.*, L. R. 2 C. P. 631; *Fordham* v. *London, Brighton, & S. C. Ry. Co.*, L. R. 3 C. P. 368; *Adams* v. *Lancashire, &c., Ry. Co.*, L. R. 4 C. P. 739. See *Burrows* v. *March Gas & Coke Co.*, L. R. 5 Ex. 67; 7 Ex. (Ex. Ch.) 96; *Armstrong* v. *The Lancashire, &c., Ry. Co.*, L. R. 10 Ex. 47; *Radley* v. *London & N. W. Ry. Co.*, L. R. 1 Ap. Cas. 754.) **1290.**

Injury to a person assisting railway servant.

Where a person, with the assent of a station master, assists the railway servants, in order to save delay in the delivery of his own goods, and in doing so is injured by the negligence of the railway servants, the company are liable. (*Wright* v. *London & N. W. Ry. Co.*, L. R. 1 Q. B. D. (Ap.) 252.) **1291.**

Negligence in case of gratuitous service.

Where a person performs a gratuitous service for another (as by driving him), such person is only liable for gross negligence on his part. (*Moffatt* v. *Bateman*, L. R. 3 P. C. 115.) **1292.**

Injury from a public nuisance.

The remedy for a public or common nuisance is by indictment. And no one can have an action for an injury from a public nuisance, unless he has sustained some particular damage to himself, distinct in its

nature from the general injury to the public; otherwise there would be a danger of a multiplicity of actions. And the plaintiff in such a case sues for that damage, and not for the breach of duty. (Ad. Torts, 2nd ed. 144–5; Broom Com. 93–5, 638, 642, 694; *Winterbottom* v. *Lord Derby*, L. R. 2 Ex. 316; *Benjamin* v. *Storr*, L. R. 9 C. P. 400.)

1293.

Action on an agreement to do an act at a future time.

Where a person is under an agreement to do an act at a future time, and in the meantime he does an inconsistent act which renders him incapable of performing his agreement, he is liable to an action as soon as he does such inconsistent act. (Broom Com. 107; Chit. Con. 643.) **1294.**

Loss of a contractor by being misled by a specification.

Where a person enters into a contract to do a work, according to the specification of an engineer, showing the mode in which the work was to be done, and it turns out that the work cannot be done in the way indicated in the specification, and in consequence of this the contractor is a great loser, it has been held that he must bear the loss; for that there was no implied warranty on the part of the person for whom the work was done, that it could be done in the way indicated, and the contracting party ought to have satisfied himself, before he entered into

the contract, that the work could be done in that way. (*Thorn* v. *Mayor, &c., of London*, L. R. 9 Ex. 163; 10 Ex. (Ex. Ch.) 112; 1 Ap. Cas. 120.) **1295.**

Liability of judicial officers.

If judges and judicial officers of Courts of limited jurisdiction exceed their authority, and thereby cause injury to another, they are amenable to an action for damages; unless they have a primâ facie jurisdiction in the matter, and had neither the knowledge of their want of actual jurisdiction, nor the means of knowledge of that fact of which they ought to have availed themselves. But if the act done is within their authority, though based on an erroneous judgment, they are not liable to an action. (Ad. Torts, 457–9; Broom Com. 99, 102, 702–3; Rosc. 599.) **1296.**

Liabilty of infants for torts.

An infant is liable to an action for a tort unconnected with a contract by him. (2 Ste. Com. 314; Ad. Torts, 731–2; Chit. Con. 143; Ad. Con. 937; *Burnard*, app., *Haggis*, resp., 14 C. B. (N. S.) 45; Crompton, J., in *Bartlett* v. *Wells*, 1 Best & Sm. 842.) **1297.**

CHAPTER II.

OF THE DIFFERENT KINDS OF ACTIONS; OF JUDGMENT; AND OF DAMAGES.

I. *The different kinds of Actions* (*a*).

Division of actions.

ACTIONS used to be divided into three classes —real, personal, and mixed. Real actions, which relate to real property, were by the stat. 3 & 4 Will. IV. c. 27, reduced to three —writ of right of dower, dower unde nihil habet, and quare impedit; and by the Common Law Procedure Act, 1860, these writs were abolished, and the plaintiff who wished for the relief formerly sought by them might commence his action by writ of summons in

(*a*) Although a new course of procedure has been framed under the Judicature Acts, it will be expedient (as a matter of historical explanation, if nothing more) to know something of the distinctions noticed under this head, as the books are full of them. At the same time it must be borne in mind that the present work is one on Jurisprudence, and not on Pleadings and Practice. How far the distinctions here noticed still subsist, the Author will not venture to state. He thought the best course was to put them in the past tense.

an ordinary action, and on such writ endorse a notice that he intended to declare in dower, or for free-bench, or in quare impedit, as the case might be. Mixed actions were also abolished, except the action of ejectment, which is termed by some a mixed action, and by others a real action. (Broom Com. 113; 3 Ste. Com. 447–8, 481.) **1298.**

Personal actions

Personal actions are those which are brought for the recovery of goods and chattels, or for damages in respect of breaches of contract, or in respect of torts. **1299.**

Personal actions are divided into—

I. Actions ex contractu, or in contract, in which the cause of action springs directly out of, or is founded upon, contract. **1300.**

II. Actions ex delicto, or of tort, in which the cause of action is founded upon a wrong, independent of contract. (Broom Com. 113–114; Sm. Action, 42–3; 3 Ste. Com. 449.) **1301.**

Actions ex contractu.

I. Actions on contract were divisible into assumpsit (which was included by some in trespass on the case), debt, covenant, account, and scire facias. Detinue was classed by some writers among actions on contract, but by others it was treated as an action of tort, and will be so considered in a subsequent page. (Broom Com. 114; Sm. Action, 44;

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Selw. 660; 3 Ste. Com. 449. See *Bryant* v. *Herbert*, L. R. 3 C. P. D. (Ap.) 389.) **1302.**

Action of assumpsit, or on promises.

On breach of a promise made verbally, or made in writing, but not by deed, and on breach of a promise implied, but not on a deed, an action on the case, upon the assumpsit or undertaking of the defendant, which was called an action of assumpsit, or more commonly, an action on promises, might be brought for the recovery of damages in respect of the breach of such promise. But where the promise was by deed an action of assumpsit would not generally lie, because an action of covenant was then the proper remedy. And to support an action of assumpsit, it was essential that the promise should be founded on a sufficient consideration; such as that of benefit to the defendant or a third person, or of damage or loss sustained by the plaintiff at the request of the defendant. (3 Bl. Com. 158, 162; 3 Ste. Com. 453, 520; Selw. c. 4; Sm. Action, c. 3; Sm. Con. 423–4.) **1303.**

Implied contracts on which an assumpsit was brought.

The implied contracts on which an assumpsit was usually brought were these: 1. An implied contract to pay for work done, services rendered, or materials supplied. This was called an assumpsit on a quantum meruit. 2. An implied contract to pay a

† So much as he has deserved.

person for goods bargained and sold, or goods sold and delivered. 3. An implied contract to hand over to a person money had and received for his use. 4. An implied contract to repay money lent to another, or money expended for him. 5. An implied contract to pay money due on an account stated. The assumpsit in this case was called an assumpsit on an insimul computassent, because it proceeded on the fact that the parties had stated their accounts together. 6. An implied contract on the part of a person who undertook any employment, trust, or duty, that he would perform it with integrity, diligence, and skill. (3 Bl. Com. 158, 162–6; Selw. 43, 69; Wms. Plead. 51–2; Sm. Action, 45; Broom Com. 114.) **1304.**

An action would lie for money had and received in various cases where a person had received money which he was not justly entitled to retain. It would lie where money was paid under a mistake of fact, not when it was paid under a mistake of law only. It would also lie for money paid upon a consideration which failed, or for money obtained through extortion, oppression, imposition, deceit, or trespass, or under an illegal contract, whilst it was executory, or where the

plaintiff did not stand in pari delicto. (Ad. Con. 27–33; 2 Sm. L. C. 358–9, 364, 367; *Atkinson* v. *Denby*, 6 Hurl. & Norm. 778; 7 Hurl. & Norm. 934; *Kitchin* v. *Hawkins*, L. R. 2 C. P. 22; *Great Western Ry. Co.* v. *Sutton*, L. R. 4 H. L. 226; *Newall* v. *Tomlinson*, L. R. 6 C. P. 405.) **1305.**

Action of debt.

If a matter of record rendered a sum certain payable by the one party to the other, payment might be enforced either by an action of debt or by a scire facias. (Sm. Con. 423.) And whenever a sum which was ascertained, or capable of being ascertained by calculation, was due on simple contract, or on bond or other specialty, or in some other way, in respect of a direct and immediate liability by a debtor to a creditor, such sum might be recovered by an action of debt. This action was only applicable to the recovery of the specific amount due, with nominal damages for its detention, and not for the recovery of damages in respect and in lieu of the sum due. (3 Bl. Com. 154–5; 3 Ste. Com. 449; Sm. Action, c. 3; Selw. c. 13; Broom Com. 115; Sm. Con. 423.) **1306.**

Action of account.

The action of account became almost obsolete. (Sm. Con. 424.) **1307.**

Action of covenant.

In the case of a contract expressed in, or

implied on, a deed, the remedy was by action of covenant for the recovery of damages proportionate to the injury sustained, unless the contract was for the payment of a liquidated sum, for which the plaintiff might, if he preferred it, maintain an action of debt. (3 Bl. Com. 156–7; 3 Ste. Com. 449; Selw. c. 12; Sm. Action, c. 3; Sm. Con. 424; Broom Com. 119.) **1308.**

Scire facias.

The remedy by writ of scire facias would lie only upon a record, and required the defendant to show cause why the party bringing it should not have advantage of such record. (Sm. Con. 422; Sm. Action, 239; Wharton.) **1309.**

Actions ex delicto.

II. Actions ex delicto, or founded on tort, were trespass, case, trover and conversion (which was a species of action of trespass on the case), and replevin. And, as already mentioned, according to the classification adopted by some writers, detinue might be classed with actions on tort. (See supra, par. 1302.) **1310.**

Action of trespass and trespass on the case.

In its most extensive sense, trespass signifies any offence against law, whether divine or human. In a narrower sense, it signifies any injury to person, character, or property, which is redressed by the municipal law. Where an injury to the real or

personal property of another, or to his person or character, was caused directly and immediately by the act of the defendant, an action of trespass was the appropriate remedy. But where such an injury was caused mediately and consequentially by the act of the defendant, or where that which was injuriously affected was not corporeal, so that the idea of force was inapplicable, an action of trespass on the case (or "case," as it was, for brevity, usually called) was the proper remedy. This was the leading distinction, but it was often very refined and difficult of application. The action of trespass was always for an injury supposed, in contemplation of law, to be accompanied with violence, and for this reason was usually called trespass vi et armis. Redress was obtained in the shape of damages. (Wms. Plead. 62; 3 Bl. Com. 153, 208; 3 Ste. Com. 450–1; Sm. Action, c. 3; Broom Com. 119–20.) **1311.**

Where there was only a direct injury to land, the remedy was by an action of trespass; but where there was a direct injury, and also a consequential damage to land, the party aggrieved might sue either in trespass or in case. (Broom Com. 752; Sm. Action, 43.) **1312.**

Trespass for removal of goods.

Where goods were wrongfully removed, an action might be maintained by the person who was in actual possession of them or had a constructive possession of them in respect of a vested right to them. This was termed trespass de bonis asportatis. (Ad. Torts, 183; Broom Com. 121–2, 776–7; Rosc. 602–3.) **1313.**

One tenant in common could not maintain trespass against another tenant in common, for cutting, in due season, and carrying away the whole of the crop. (*Jacobs* v. *Seward*, L. R. 4 C. P. 328; 5 H. L. 464.) **1314.**

Action of trover and conversion, or for conversion.

Where a person has wrongfully converted chattels to his own use, either actually or constructively, according to the technical import of the word conversion, the person who had an absolute or qualified property in them, and had the right of possession as against him, might bring an action of trover: which was originally applicable only to chattels detained by one who had found them, or come lawfully to the possession of them, and which was sometimes called an action for conversion, or of trover and conversion. (Broom Com. 121, 771–2; Rosc. 631, 637–8; *Burroughes* v. *Bayne*, 5 Hurl. & Norm. 296.) But the judgment in this action was for the recovery of damages

only, equal to the value of the chattels, not for the recovery of the specific chattels. (3 Bl. Com. 152–3; 3 Ste. Com. 515–517; Selw. c. 38; Mayne, 203; Rosc. 646.) **1315.**

The gist of the action of trover did not consist in the wrongful taking, as in the case of trespass de bonis asportatis, but in the conversion. (Broom Com. 776; Mayne, 203; Rosc. 640.) **1316.**

A conversion is an asportation or disposal of a chattel for the use of the defendant or some other person, or an assertion of right to the dominion over it by the defendant, and a refusal to deliver it up at all, or except on conditions which the defendant has no right to impose, or a wilful destruction of it, or a detaining it so as to deprive the owner of the dominion over it. (Ad. Torts, 183–7; Broom Com. 774–6; Rosc. 640–644; *Burroughes* v. *Bayne*, 5 Hurl. & Norm. 296; *Pillot* v. *Wilkinson*, 2 Hurl. & Colt. 72, 345; *Johnson* v. *Stear*, 15 C. B. (N. S.) 330. See *Fowler* v. *Hollins*, L. R. 7 Q. B. (Ex. Ch.) 616; 7 H. L. 757; *England* v. *Cowley*, L. R. 8 Ex. 126; *Hiort* v. *Bott*, L. R. 9 Ex. 86.) **1317.**

The recovery of judgment in an action of trover operated as a transfer of the property

in the goods from the plaintiff to the defendant. (Ad. Torts, 219 ; Broom Com. 776.) **1318.**

Substantial damages were recoverable in trover for wrongfully assuming a dominion over the chattels of another, even though no pecuniary damage might have been sustained. (Ad. Torts, 231.) **1319.**

In actions for the conversion of chattels, the full value of the chattels at the time of the conversion was in general the measure of the damages. But if special damage, as the necessary consequence of the conversion, had been sustained and was claimed, an amount far exceeding the value of the goods might often be recovered. And, on the other hand, if the goods had been tendered and received back after action, the plaintiff might proceed in the action for the actual damage (if any) and his costs. (Ad. Torts, 231, 234–5 ; Mayne, 203–217 ; *Edmondson* v. *Nuttall*, 17 C. B. (N. S.) 280.) **1320.**

Action of replevin.

Replevin is the re-delivery or restitution of goods wrongfully taken from any person having absolute or qualified property in them. It is almost exclusively confined in practice, however, to the re-delivery of things taken by way of distress for rent or for damage feasant, that is, damage done. **1321.**

Replevin was formerly effected by the sheriff and his deputies, who were called replevin clerks. But replevin, in the case of distress, is now effected by the County Court. This re-delivery usually takes place before any action is brought for the restitution of the goods. They are re-delivered to the owner on his demanding their restitution, as if he had succeeded in an action for that purpose: but he gives a bond with sureties, or makes a deposit of money to secure the commencement and prosecution of an action of replevin by him, as if they had not been re-delivered. This is for the purpose of trying the right to take them, and to secure the return of the goods to the person who took them, in case the taking of them should not appear to have been wrongful. **1322.**

Upon the action of replevin being brought by the owner (who is called the replevisor) from whom the goods were taken, and to whom they have been re-delivered, the defendant, or distrainor, who took the chattels, either makes avowry (*i.e.*, he avows taking the distress, in his own right or in right of his wife, and sets forth the reason of it, as for rent in arrear, damage done, or other cause); or else he justifies, in right of another

person, as the bailiff or servant of such other person; in which case he is said to make cognisance, because he acknowledges the taking, but insists that such taking was legal, as he acted by the command of a person who had a right to distrain. And on the truth or merits of this avowry or cognisance, the cause is determined. (See 3 Bl. Com. 145–150; 3 Ste. Com. 510–511; Selw. c. 32; Chit. Archb. 1013; Broom Com. 122; 19 & 20 Vict. c. 108, s. 63, 65, 66; C. L. Pro. Act, 1860 (23 & 24 Vict. c. 126), s. 22–24.)

1323. Where chattels were unjustly detained, although the original taking of them was not unlawful, an action of detinue might be brought to recover them, or the value of them. It was necessary, however, that they should be capable of being ascertained with certainty; so that money or corn, not contained in a bag or chest, or otherwise capable of being distinguished from other property of the same kind, could not be the subject of this action. The plaintiff must have had an absolute or qualified property in them; and the defendant must have come lawfully into possession of them, as either by delivery of them, or by finding them. The defendant had the option of giving up the chattel, or of

Action of detinue.

paying the value, *i.e.*, the highest price of it in the market at any time during its detention, together with damages for its detention, unless the Court or a judge, on the application of the plaintiff, ordered that execution should issue for the chattel, and that, if the chattel could not be found, a distress should be levied upon the defendant's lands and goods until he surrendered it, or, at the option of the plaintiff, that the assessed value of the chattel should be made by the sheriff of the defendant's goods. (3 Bl. Com. 151; 3 Ste. Com. 513–514; Selw. 660–663; Sm. Action, 43; Sm. Con. 418; Wms. Plead. 238; Broom Com. 117; Ad. Torts, 300; Rosc. 659; C. L. Pro. Act, 1854 (17 & 18 Vict. c. 125), s. 78.) **1324.**

Action of ejectment.

When a person entitled to land has a right of entry, he may take possession, provided he does so in a peaceable manner, without force. But if the right of entry is not clear, or the person in possession is an obstinate man, it is best to proceed by ejectment. (Chit. Archb. 951; Cole Eject. 66–71; Ad. Con. 366.) **1325.**

An ejectment is the ordinary mode in which the title to lands and tenements is tried (though not conclusively and finally), and the possession recovered, in cases where the party claiming title has a right of entry, whether such title be to an estate in fee, in tail, for life, or for years. An ejectment will not lie for an incorporeal hereditament alone. It was formerly a fictitious proceeding, but the procedure is now entirely altered. The plaintiff may recover damages in respect of the mesne profits which the defendant has wrongfully received. But he cannot recover any rents and profits, except for the last six years. (Cole, 1–3, 77, 91, 634–5; 3 Bl. Com. 199–206; 3 Ste. Com. 481, 683–6, 690; Sm. Action, c. 13; Selw. 691–3, 705; Broom Com. 736–8, 744–5; Rosc. 628–631; C. L. Pro. Act, 1852 (15 & 16 Vict. c. 76), s. 168–221.) **1326.**

Action of trespass quare clausum fregit

There is one species of action of trespass which may be naturally mentioned here. Every unwarrantable entry on the soil of which another is in possession, whether such entry is by a person himself or by his cattle, and whether it is productive of any actual

specific damage or not, is termed a trespass by breaking his close; and the action for this wrong was called an action of trespass quare clausum fregit; for every man's land is, in the eye of the law, enclosed and set apart from his neighbour's, either by a visible and material fence, or by an invisible ideal boundary, existing only in contemplation of law, as when one man's land adjoins to another in the same field. (3 Bl. Com. 209; 3 Ste. Com. 487–490; Selw. 1295; Broom Com. 747.) **1327.**

In the popular, well-understood sense of the term, a person is not justified in carrying on fox-hunting as a sport over the land of another against his will. (*Paul* v. *Summerhayes*, L. R. 4 Q. B. D. 9.) **1327a.**

In respect of the mere violation of the plaintiff's right, he is entitled to recover at least nominal damages; and in respect of any specific damage, he is entitled to further or special damages. (Broom Com. 747; Mayne, 3, 4.) **1328.**

If a person grants a right of way over his field to another, and then places across the way an obstruction not allowing of easy removal, the grantee may go round to connect the two parts of his way on each side of the obstacle over the grantor's land, without

trespass. (*Selby* v. *Nettlefold*, L. R. 9 Ch. Ap. 111, 114.) **1329.**

To maintain an action for trespass qu. cl. fr. the plaintiff must have been in actual possession (by himself, whether as owner or as tenant, or by his servant or agent), either at the time of the trespass, or by relation to that time, as in the case of an heir, who, after entry, might sue for a trespass committed after the accrual of his right and before entry. But a reversioner was not without remedy in respect of a permanent injury to his reversion; for he might sue in case, though not in trespass. (Broom Com. 747, 750; Selw. 1298; Rosc. 606–8.) **1330.**

Action against the sheriff.

In actions against the sheriff, not only must there have been a wrong, but actual damage to the plaintiff must have been thereby occasioned, in order to entitle him to recover. (*Stimson* v. *Farnham*, L. R. 7 Q. B. 175.) And hence an action cannot be maintained against a sheriff for negligence in not levying under a fi. fa., where, from the circumstances, the probability is, that had he levied, no benefit would have resulted to the

plaintiff, and therefore it is doubtful whether he sustained any damage by the negligence. (*Hobson* v. *Thelluson*, L. R. 2 Q. B. 642; *Dennis* v. *Whetham*, L. R. 9 Q. B. 345.) **1331.**

II. *Judgment.*

Judgment operates as a merger of the cause of action.

Where a judgment has been obtained, whether in a matter of contract or in a matter of tort, the cause of action, whether against the same or another party, becomes merged and changed into a matter of record: transit in rem judicatam: and after a judgment recovered against one of two joint debtors or joint tort feasors, the other cannot be sued, though no satisfaction was obtained from the former. (Broom Com. 262–4; *Brinsmead* v. *Harrison*, L. R. 7 C. P. (Ex. Ch.) 547; *Kendall* v. *Hamilton*, L. R. 3 C. P. D. (Ap.) 403; 4 Ap. Cas. 504.) **1332.**

Judgment against one of two joint debtors or tort feasors.

Judgment an estoppel.

By a final judgment inter partes, they are estopped or prevented from again litigating the matter. But those who are neither party nor privy to it will not be affected, except where it relates to public matters. Nor will it be of any avail where it is given by a person who is interested, or where it has been obtained by fraud. (Broom Com.

265–6; Rosc. 157–160; *Newington* v. *Levy*, L. R. 6 C. P. (Ex. Ch.) 180.) **1333.**

III. *Damages.*

General remarks on damages.

In addition to the remarks incidentally made on damages, in the course of the preceding pages, some general observations on the same subject may here be added. **1334.**

General and special damages.

Damages are either general or special. General damages are such as the law implies. Special damages are such as have actually been sustained. (Broom Com. 823; Mayne, 315.) **1335.**

Measure of damages. With whom question of damages rests.

All questions of damages are for the jury; but it is the province of the judge to direct them to award damages according to certain established rules, so far as they are applicable. (See Powell, 240–241; Mayne, 337; Chit. Con. 793; Ad. Con. 1047.) **1336.**

Where they will be given in actions on contract.

Damages will be given in every case where a plaintiff succeeds in an action for breach of a contract; but where no loss is sustained, they will be only nominal. But even nominal damages are very important; for, without a verdict for damages, the plaintiff cannot recover his costs of suit. (Powell, 252; Broom Com. 607; Chit. Con. 788; Ad. Con. 1048–9.) **1337.**

Cases where there is a penalty.

Where there is a penalty and a covenant

in the same deed, to secure the performance of an agreement, the party aggrieved by the non-performance may sue for the penalty or for damages under the covenant. But even in the former case, in consequence of the statute 8 & 9 Will. III. c. 11, s. 8, he cannot recover a larger amount (not exceeding the penalty) than the jury assess as the damages. And where a person sues on a bond with a penalty for securing performance of an agreement, he cannot recover a larger amount (not exceeding the penalty) than the jury assess as the damages. (Ad. Con. 1070–1072; Chit. Con. 787.) **1338.**

Cases of liquidated damages.

Where, on breach of an agreement, an ascertained sum is to be paid, that sum, together with interest when recoverable, will be the measure of damages, unless the circumstances are such as lead the Court to the conclusion that such a sum is really a penalty. The construction of the agreement will not depend on the name given in it to the sum; for it may be construed to be a penalty, though expressed to be a sum payable by way of liquidated, that is, ascertained, damages, and not by way of penalty; or it may be construed to be liquidated damages, though expressed to be a penalty. And the circumstances which tend to ex-

tenuate the defendant's conduct, or to throw the blame partly on the plaintiff, will be taken into account in mitigation of damages. (Broom Com. 607–612; Powell, 241, 268, 271; Mayne, 65–8; Ad. Con. 1072–5; *Sparrow* v. *Paris*, 7 Hurl. & Norm. 594; *Magee* v. *Lavell*, L. R. 9 C. P. 107.) **1339.**

Damages naturally resulting from a breach of contract.

Where a person makes a contract, and breaks it, he must pay the whole damage naturally resulting, *i.e.*, resulting and likely to have so resulted from such a breach in the ordinary course of things, or such damages as may be reasonably supposed to have been in the contemplation of the parties. Thus, where a person sells a cow with foot and mouth disease to another person whom he knows to be a farmer, and the buyer places the cow with others, and they take the disease from her, and she and they die of it, the seller is responsible for the whole loss. But ordinarily a person will not be liable for more remote damages. And if the loss is a natural consequence of the breach by reason of special circumstances, it must in general be shown that they were known to the defendant, or he must be sufficiently put upon inquiry to render it incumbent upon him to have made himself acquainted with them. (Broom Com. 612–613, 625, 629; Powell,

242–7; Mayne, 6–8, 14, et seq.; Chit. Con. 789; Ad. Con. 1049, 1050. See *Wilson* v. *Newport Dock Co.*, 4 Hurl. & Colt. 232; *Great Western Ry.* v. *Redmayne*, L. R. 1 C. P. 329; *Woodger* v. *Great Western Ry.*, L. R. 2 C. P. 318; *Cory* v. *Thames Iron Works Co.*, L. R. 3 Q. B. 181; *Engell* v. *Fitch*, L. R. 3 Q. B. 314; 4 Q. B. (Ex. Ch.) 659; *Spedding* v. *Nevell*, L. R. 4 C. P. 212; *Horne* v. *Midland Ry. Co.*, L. R. 7 C. P. 583; 8 C. P. (Ex. Ch.) 131, 144–5; *Elbinger Actien-Gesellschafft* v. *Armstrong*, L. R. 9 Q. B. 473; *Bradshaw* v. *Lancashire, &c., Ry. Co.*, L. R. 10 C. P. 189; *Baxendale* v. *London, Chatham & Dover Ry. Co.*, L. R. 10 Ex. (Ex. Ch.) 35; *Smith* v. *Green*, L. R. 1 C. P. D. 92; *Simpson* v. *London & N. W. Ry. Co.*, L. R. 1 Q. B. D. 274; *Sanders* v. *Stuart*, L. R. 1 C. P. D. 326; *Fisher* v. *The Val de Travers Asphalte Co.*, L. R. 1 C. P. D. 511; *Randall* v. *Newson*, L. R. 2 Q. B. D. (Ap.) 102; *Hydraulic Co.* v. *McHaffie*, L. R. 4 Q. B. D. (Ap.) 670.) (*a*)

(*a*) The case of *Hobbs* v. *Lond. & S. W. Ry. Co.*, L. R. 10 Q. B. 111, appears to the writer to be a lamentable decision. The loss which arose was a natural result and the direct result, though not an inevitable result, of an act which was not only a breach of contract but a positive tort; and it ought to have been borne by the company, and not by the plaintiff.

See infra, par. 1348, 1349, as to the measure of damages in cases of tort. In *Horne* v. *Midland Ry. Co.*, L. R. 7

And even in that case it has been considered undecided whether he would be liable for all the consequences, without any contract to that effect. (*Elbinger Actien-Gesellschafft* v. *Armstrong*, L. R. 9 Q. B. 473.) **1340.**

Damages for non-delivery or non-acceptance of goods, shares, or stock sold.

In an action for the non-delivery or for the non-acceptance of goods, stock, or shares, purchased, but not paid for, the measure of damages is the difference (if any) between the stipulated price and the price for which they might have been bought at the time of the breach of contract: so that if there is no such difference, nominal damages only will be recoverable. But, on proof that time, trouble, and expense have been occasioned, the measure of damages may be increased. (Broom Com. 614–616; Powell, 242–3; Mayne, 6, 78–81; Rosc. 365, 370; Chit. Con. 791–2; *Ogle* v. *Earl Vane*, L. R. 2 Q. B. 275; 3 Q. B. (Ex. Ch.) 272. See supra, par. 566–9.) **1341.**

Where the contract is to deliver in parcels at different times, the difference ought to be taken at the end of each period. (*Brown* v. *Muller*, L. R. 7 Ex. 319.) **1342.**

Where a purchaser of goods to be delivered

C. P. 590, Willes, J., said, "The cases as to the measure of damages for a tort do not apply to a case of contract."

by a certain day re-sells them before that day, and the original seller does not fulfil his contract, so that the purchaser from him is prevented from fulfilling his contract of re-selling, the original purchaser cannot recover from the original seller the profit he, the original purchaser, would have made by the re-sale, though it be usual for a re-sale to be made before delivery to the original purchaser, where the goods are of a nature that they can readily be bought. The damages will only be the difference between the price under the original contract and the market price on the last day for delivery, where the price of the article has risen, with an allowance for any considerable trouble or costs out of pocket on the original purchase. (Chit. Con. 8th ed. 411; Ad. Con. 6th ed. 1074; *Williams* v. *Reynolds*, 6 Best & Sm. 495.) But where goods of the like kind cannot readily be bought, the difference between the price at which they were bought and the price at which they were re-sold, is the measure of damages, though the original seller may have had no notice of the re-sale, or of the purpose for which the original purchaser bought them. (*France* v. *Gaudet*, L. R. 6 Q. B. 199.) **1343.**

Damages

In an action against a railway company

for non-delivery against a carrier.

or carrier for the non-delivery of goods, the measure of damages is the price at which the goods can be obtained in the market for such goods, if there is one, at the place and time at which they ought to have been delivered; and if not, the damages must be ascertained by taking into consideration the cost price, and the expenses of transit, and the profit likely to be made by a person importing them to such place. (*O'Hanlan* v. *Great Western Ry.*, 6 Best & Sm. 484.) **1344.**

Damages in an action by a purchaser of realty.

In an action by a purchaser for breach of a contract to sell real estate or a chattel real, when the sale goes off for want of a good title, without any fault on the part of the vendor, the damages are limited to the expenses. But when the sale goes off because the vendor has changed his mind, or improperly contracted to sell when he knew or ought to have known that he was not the owner, or otherwise by his fault, the purchaser is entitled to the difference between the contract price and the market price when the contract was broken; and if the purchaser has re-sold at a profit, this profit, in the absence of evidence to the contrary, will be deemed to be evidence of that market price. (Broom Com. 621–2; Powell, 244; Mayne, 11, 12, 91–4; Ad. Con. 1054–5;

Sikes v. *Wild*, 1 Best & Sm. 587; 4 Best & Sm. 421; *Engell* v. *Fitch*, L. R. 3 Q. B. 314; 4 Q. B. (Ex. Ch.) 659; *Bain* v. *Fothergill*, L. R. 6 Ex. 59; 7 H. L. 158.)

1345.

Damages in an action by a vendor of realty.

In an action by a vendor against a purchaser of real estate who refuses to complete, where no conveyance has been executed, the vendor can only recover the damages actually sustained by the breach of the contract: that is, the difference (if any) between the agreed price and the market price as ascertained by a re-sale, if the vendor has exercised his right of re-sale, within a reasonable time, or as computed, together with the expenses he has incurred. As he retains the land, he cannot have the purchase-money also. (Broom Com. 623; Powell, 245; Mayne, 94–5; Ad. Con. 1053.) **1346.**

Motive or animus.

In determining the amount of damages to be awarded for breach of a contract, the motive or animus of the defendant is disregarded, except in those cases in which the breach of contract is in the nature of a tort. In such cases (as in cases of breach of promise of marriage) high damages may be recovered, without proving any substantial injury. (Broom Com. 696–7; Powell, 252; Mayne, 10.) **1347.**

Damages in actions of tort.

In actions of tort, the damages are, in general, simply by way of compensation. But the jury may take into account, not only the present injury and expense, but the probable future injury, the feelings of the party injured, and, in some cases, the animus of the wrong-doer, as well as circumstances of aggravation or mitigation. And in some cases (as in cases of wilful wrong, especially if accompanied with insolent expressions) damages are given which may be regarded as penal. Such damages are termed exemplary or vindictive. (Broom Com. 816–823; Powell, 256, 271; Ad. Torts, 4th ed. 609, 610; Mayne, 12–14; Rosc. 594; *Emblen* v. *Myers*, 6 Hurl. & Norm. 54.) **1348.**

An action of tort may be maintained for damages, proximately, naturally, or probably, and not too remotely, resulting from the tortious act or negligence, (whether alone or combined or followed by some other act or circumstances naturally or probably arising,) or from special circumstances connected with the tortious act or negligence, and known to the defendant. (Broom Com. 92, 824; Ad. Torts, 178; Mayne, 14, et seq.; *Richardson* v. *Dunn*, 8 C. B. (N. S.) 655; *Hoey* v. *Felton*, 11 C. B. (N. S.) 142; *Adams* v. *Lancashire, &c., Ry. Co.*, L. R. 4 C. P. 739;

Sharp v. *Powell*, L. R. 7 C. P. 253; *Gee* v. *Metropolitan Ry. Co.*, L. R. 8 Q. B. (Ex. Ch.) 161; *Sneesby* v. *Lancashire, &c., Ry. Co.*, L. R. 9 Q. B. 263; 1 Q. B. D. (Ap.) 42; *Jackson* v. *Metropolitan Ry. Co.*, L. R. 2 C. P. D. (Ap.) 125; 3 H. L. 193; *Clark* v. *Chambers*, L. R. 3 Q. B. D. 327; *Harris* v. *Mobbs*, L. R. 3 Ex. D. 268. And see *Glover* v. *London & S. W. Ry. Co.*, L. R. 3 Q. B. 25, as affirming the principle, though the decision appears questionable.) **1349.**

Where a new trial will be granted on account of the damages given.

In general, the Court will not disturb a verdict, where there is no certain measure of damages. But if the jury give damages in respect of matters extraneous to the case; or if there is some error in law, or unquestionable mistake in calculation, or gross misconduct of the jury; or if the damages are grossly excessive or inadequate, a new trial will be granted. (Powell, 257; Mayne, 343–7; Chit. Con. 795; Ad. Con. 1052–3; *Pym* v. *Great Northern Ry. Co.*, 2 Best & Sm. 759; *Kelly* v. *Sherlock*, L. R. 1 Q. B. 686; *Falvey* v. *Stanford*, L. R. 10 Q. B. 54; *Phillips* v. *London & S. W. Ry. Co.*, L. R. 5 Q. B. D. (Ap.) 78.) **1350.**

Reduction of damages by accidental insurance policy.

In an action for injuries caused by defendant's negligence, a sum received by the plaintiff on an accidental insurance policy

cannot be taken into account in reduction of damages; because he receives that sum as an equivalent for the premiums he has paid. (*Bradburn* v. *Great Western Ry. Co.*, L. R. 10 Ex. 1.) **1351.**

CHAPTER III.

OF THE LIMITATION OF ACTIONS, BY THE LAW BEFORE THE STAT. 37 & 38 VICT. C. 57 (*a*).

PART IV. TIT. II. CAP. III.

Limitation of actions, in the case of land or rent;

AN action or suit to recover any land or rent (existing as an inheritance distinct from the land) can only be brought within twenty years next after the time at which the right to bring such action or suit shall have first accrued. (3 & 4 Will. IV. c. 27, s. 2.) But if a person is under disability of infancy, coverture, unsoundness of mind, or absence beyond the seas, at the time the right first accrued to him, he and those claiming through him have ten years from the termi-

(*a*) On the limitation of actions the reader is referred to a recent work, which cannot fail to be very useful, by Henry Thomas Banning, M.A., barrister-at-law.

On the 7th of August, 1874, an Act (37 & 38 Vict. c. 57) was passed "for the further limitation of actions and suits relating to real property;" but it was not to come into operation till January 1, 1879. Such a limitation as twelve years, without even an allowance for absence beyond the seas, ought not to have been entertained. It may perpetrate many a cruel and unjustifiable robbery. It is printed infra, page 585.

nation of such disability or his death, notwithstanding the expiration of the twenty years. But no entry, distress, or action can be made or brought but within forty years from the first accruer of the right. (s. 16, 17.) **1352.**

in the case of a mortgage;

A mortgagor is barred at the end of twenty years from the time when the mortgagee took possession, or from the last written acknowledgment. (s. 28.) **1353.**

in the case of ecclesiastical or eleemosynary corporation sole;

No land or rent can be recovered by any ecclesiastical or eleemosynary corporation sole after two incumbencies and six years, or such further time as will make up sixty years from the accruer of the right. (s. 29.) **1354.**

in the case of a right of presentation or advowson;

No benefice can be recovered after three adverse incumbencies, or such further period as will make up sixty years, or after a hundred years' adverse possession. (s. 30, 33.) **1355.**

in the case of money charged upon or payable out of land and legacies or personal estate of an intestate;

No proceeding can be brought, to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, or any legacy, or the personal estate or a share of the personal estate of an intestate possessed by his legal personal representative, but within twenty years next after a present

right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same; unless in the meantime some part of the principal money, estate, or share, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person by whom the same was payable, or his agent, to the person entitled thereto or his agent; and in such case no proceeding can be brought but within twenty years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was given. This, however, does not apply to cases of express trust. (3 & 4 Will. IV. c. 27, s. 40; 23 & 24 Vict. c. 38, s. 13.)

1356. No arrears of dower, nor any damages on account of such arrears, can be recovered or obtained by any action or suit for a longer period than six years next before the commencement of such action or suit. (3 & 4 Will. IV. c. 27, s. 41.)

in the case of dower;

1357. No arrears of rent, or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears, can be recovered by any dis-

in the case of arrears of rent or interest;

tress, action, or suit, but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent. (s. 42.)

1358.

Actions of trespass for assault, menace, wounding, and imprisonment, must be brought within four years: action on the case for verbal slander within two years; and other actions of trespass for injuries to the person, or to land, or to personal property, and actions of detinue, trover, replevin, or account, and actions of trespass on the case (except for verbal slander), and actions for arrears of rent on a demise without deed, and other actions on simple contract, whether in assumpsit or debt, within six years after the cause of action accrued, or after the removal of the disability, in the case of any person entitled to sue being an infant, or a married woman, or non compos, at the time when the time of action accrued, or after the return of a person liable to be sued being at the time beyond the seas. (21 Jac. I. c. 16, s. 3, 7; 4 & 5 Anne, c. 16, s. 19; 19 & 20 Vict. c. 97,

in the case of trespass, trespass on the case, detinue, trover, replevin, and simple contract;

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s. 9–11; *Wilkinson* v. *Verity*, L. R. 6 C. P. 206.) **1359.**

But the protection of the statute, in cases of debt, is removed, if the defendant has, before or after the lapse of time, given an unconditional acknowledgment in writing of the debt, signed by him or his agent, in such terms as express or imply, or at least do not preclude the Court from inferring, a new promise to pay, unconditionally, or on request, or on a condition which has been fulfilled, or at a time which has passed, or on an event which has happened. In such case, an action may be grounded on the new promise. The old debt is only revived as a consideration to support the new promise. (9 Geo. IV. c. 14; 19 & 20 Vict. c. 97, s. 13, 14; supra, par. 169, 170; *Cockrill* v. *Sparkes*, 1 Hurl. & Colt. 699; *Buckmaster* v. *Russell*, 10 C. B. (N. S.) 745; *Cornforth* v. *Smithard*, 5 Hurl. & Norm. 13; *Lee* v. *Wilmot*, L. R. 1 Ex. 364; *In re River Steamer Co., Mitchell's Claim*, L. R. 6 Ch. Ap. 822; *Chasemore* v. *Turner*, L. R. 10 Q. B. (Ex. Ch.) 500; Banning on "Limitation of Actions," Ch. V.) And part-payment of principal or interest may take the case out of the statute. (*Maber* v. *Maber*, L. R. 2 Ex. 153.) **1360.**

A request to a creditor to send in his

account is an acknowledgment, which will take the case out of the statute. (*Quincey* v. *Sharpe*, L. R. 1 Ex. D. 72.) **1361.**

in the case of debt for rent, or covenant, or debt on any specialty;

Actions of debt for rent upon any indenture of demise, or of covenant or debt on any bond or other specialty, must be brought within twenty years after the cause of action accrued, or after the removal of the disability, in the case of a person entitled to sue being an infant, married woman, or non compos; or after the return of the defendant, if abroad; or from the date of an acknowledgment of a debt, in writing, signed by the defendant or his agent, or from a part payment of principal or interest. (3 & 4 Will. IV. c. 42; s. 3–5; 19 & 20 Vict. c. 97, s. 10. —And as to the Statutes of Limitation, relating to these and the several other cases above mentioned, see also 3 Ste. Com. 546–550; Sm. Con. 425, 434–5, 452; Sm. Action, 47; Selw. 29, 153, 163, 166, 557, 629, 1060, 1267, 1302, 1371; Rosc. 454–464, 501; Chit. Con. 720–750; and Banning on "Limitation of Actions.") **1362.**

in other cases.

Actions and suits, in certain other cases, are also subjected to Statutes of Limitation. (See 3 Ste. Com. 550–1; and Banning.) **1363.**

Express trusts.

By the Supreme Court of Judicature Act,

1873, s. 25, clause (2), it is enacted that "no claim of a cestui que trust against his trustee for any property held on an express trust, or in respect of any breach of such trust, shall be held to be barred by any Statute of Limitations." **1364.**

CHAPTER IV.

OF THE LIMITATION OF ACTIONS RELATING TO REAL PROPERTY, BY THE STAT. 37 & 38 VICT. C. 57.

By the stat. 37 & 38 Vict. c. 57, passed the 7th August, 1874, and entitled "An Act for the further Limitation of Actions and Suits relating to Real Property," it is enacted as follows:—

No land or rent to be recovered but within twelve years after the right of action accrued.

1. After the commencement of this Act no person shall make an entry or distress, or bring an action or suit, to recover any land or rent, but within twelve years next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twelve years next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to the person making or bringing the same. **1365.**

Provision for case of future estates.

2. A right to make an entry or distress, or to bring an action or suit, to recover any land or rent, shall be deemed to have first accrued in respect of an estate or interest in reversion or remainder, or other future estate or interest, at the time at which the same shall have become an estate or interest in possession, by the determination of any estate or estates in respect of which such land shall have been held, or the profits thereof or such rent shall have been received, notwithstanding the person claiming such land or rent, or some person through whom he claims, shall at any time previously to the creation of the estate or estates which shall have determined, have been in the possession or receipt of the profits of such land, or in receipt of such rent: But if the person last entitled to any particular estate on which any future estate or interest was expectant shall not have been in the possession or receipt of the profits of such land, or in receipt of such rent, at the time when his interest determined, no such entry or distress shall be made, and no such action or suit shall be brought, by any person becoming entitled in possession to a future estate or interest, but within twelve years next after the time when the right to make an entry or distress, or to bring an

Time limited to six years when person entitled to the particular estate out of possession, &c.

action or suit, for the recovery of such land or rent, shall have first accrued to the person whose interest shall have so determined, or within six years next after the time when the estate of the person becoming entitled in possession shall have become vested in possession, whichever of those two periods shall be the longer; and if the right of any such person to make such entry or distress, or to bring any such action or suit, shall have been barred under this Act, no person afterwards claiming to be entitled to the same land or rent in respect of any subsequent estate or interest under any deed, will, or settlement, executed or taking effect after the time when a right to make an entry or distress, or to bring an action or suit, for the recovery of such land or rent, shall have first accrued to the owner of the particular estate whose interest shall have so determined as aforesaid, shall make any such entry or distress, or bring any such action or suit, to recover such land or rent. **1366.**

In cases of infancy, coverture, or lunacy at the time when the right of action accrues, then six years to be allowed

3. If at the time at which the right of any person to make an entry or distress, or to bring an action or suit, to recover any land or rent, shall have first accrued as aforesaid, such person shall have been under any of the disabilities hereinafter mentioned, (that

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is to say,) infancy, coverture, idiotcy, lunacy, or unsoundness of mind, then such person, or the person claiming through him, may, notwithstanding the period of twelve years, or six years, (as the case may be,) hereinbefore limited shall have expired, make an entry or distress, or bring an action or suit, to recover such land or rent, at any time within six years next after the time at which the person to whom such right shall first have accrued shall have ceased to be under any such disability, or shall have died (whichever of those two events shall have first happened). **1367.**

from the termination of the disability or previous death.

No time to be allowed for absence beyond seas.

4. The time within which any such entry may be made, or any such action or suit may be brought as aforesaid, shall not in any case after the commencement of this Act be extended or enlarged by reason of the absence beyond seas during all or any part of that time of the person having the right to make such entry, or to bring such action or suit, or of any person through whom he claims. **1368.**

Thirty years utmost allowance for disabilities.

5. No entry, distress, action, or suit shall be made or brought by any person who at the time at which his right to make any entry or distress, or to bring an action or suit, to recover any land or rent, shall have

first accrued, shall be under any of the disabilities hereinbefore mentioned, or by any person claiming through him, but within thirty years next after the time at which such right shall have first accrued, although the person under disability at such time may have remained under one or more of such disabilities during the whole of such thirty years, or although the term of six years from the time at which he shall have ceased to be under any such disability, or have died, shall not have expired. **1369.**

In case of possession under an assurance by a tenant in tail which shall not bar the remainders, they shall be barred at the end of twelve years after that period, at which the assurance, if then executed, would have barred them.

6. When a tenant in tail of any land or rent shall have made an assurance thereof which shall not operate to bar the estate or estates to take effect after or in defeasance of his estate tail, and any person shall by virtue of such assurance at the time of the execution thereof, or at any time afterwards, be in possession or receipt of the profits of such land, or in the receipt of such rent, and the same person or any other person whosoever (other than some person entitled to such possession or receipt in respect of an estate which shall have taken effect after or in defeasance of the estate tail) shall continue or be in such possession or receipt for the period of twelve years next after the commencement of the time at which such

assurance, if it had then been executed by such tenant in tail, or the person who would have been entitled to his estate tail if such assurance had not been executed, would, without the consent of any other person, have operated to bar such estate or estates as aforesaid, then, at the expiration of such period of twelve years, such assurance shall be and be deemed to have been effectual as against any person claiming any estate, interest, or right to take effect after or in defeasance of such estate tail. **1370.**

Mortgagor to be barred at end of twelve years from the time when the mortgagee took possession or from the last written acknowledgment.

7. When a mortgagee shall have obtained the possession or receipt of the profits of any land or the receipt of any rent comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring any action or suit to redeem the mortgage but within twelve years next after the time at which the mortgagee obtained such possession or receipt, unless in the meantime an acknowledgment in writing of the title of the mortgagor, or of his right to redemption, shall have been given to the mortgagor or some person claiming his estate, or to the agent of such mortgagor or person, signed by the mortgagee or the person claiming through him; and in such case no such action or suit shall be brought but within twelve years

next after the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given; and when there shall be more than one mortgagor, or more than one person claiming through the mortgagor or mortgagors, such acknowledgment, if given to any of such mortgagors or persons, or his or their agent, shall be as effectual as if the same had been given to all such mortgagors or persons; but where there shall be more than one mortgagee, or more than one person claiming the estate or interest of the mortgagee or mortgagees, such acknowledgment, signed by one or more of such mortgagees or persons, shall be effectual only as against the party or parties signing as aforesaid, and the person or persons claiming any part of the mortgage money or land or rent by, from, or under him or them, and any person or persons entitled to any estate or estates, interest or interests, to take effect after or in defeasance of his or their estate or estates, interest or interests, and shall not operate to give to the mortgagor or mortgagors a right to redeem the mortgage as against the person or persons entitled to any other undivided or divided part of the money or land or rent; and where such of the mortgagees or persons

aforesaid as shall have given such acknowledgment shall be entitled to a divided part of the land or rent comprised in the mortgage, or some estate or interest therein, and not to any ascertained part of the mortgage money, the mortgagor or mortgagors shall be entitled to redeem the same divided part of the land or rent on payment, with interest, of the part of the mortgage money which shall bear the same proportion to the whole of the mortgage money as the value of such divided part of the land or rent shall bear to the value of the whole of the land or rent comprised in the mortgage. **1371.**

Money charged upon land and legacies to be deemed satisfied at the end of twelve years if no interest paid nor acknowledgment given in writing in the meantime.

8. No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent at law or in equity, or any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable,

or his agent, to the person entitled thereto, or his agent; and in such case no such action or suit or proceeding shall be brought but within twelve years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was given. **1372.**

Act to be read with 3 & 4 Will. IV. c. 27, of which certain parts are repealed, and other parts to be read in reference to alteration by this Act.

9. From and after the commencement of this Act all the provisions of the Act passed in the session of the third and fourth years of the reign of His late Majesty, King William the Fourth, chapter twenty-seven, except those contained in the several sections thereof next hereinafter mentioned, shall remain in full force, and shall be construed together with this Act, and shall take effect as if the provisions hereinbefore contained were substituted in such Act for the provisions contained in the sections thereof numbered two, five, sixteen, seventeen, twenty-three, twenty-eight, and forty respectively (which several sections, from and after the commencement of this Act, shall be repealed), and as if the term of six years had been mentioned, instead of the term of ten years, in the section of the said Act numbered eighteen, and the period of twelve years had been mentioned in the said section eighteen instead of the period of twenty

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years; and the provisions of the Act passed in the session of the seventh year of the reign of His late Majesty, King William the Fourth, and the first year of the reign of Her present Majesty, chapter twenty-eight, shall remain in full force, and be construed together with this Act, as if the period of twelve years had been therein mentioned instead of the period of twenty years. **1373.**

7 Will. IV. & 1 Vict. c. 28, to be read with this Act.

Time for recovering charges and arrears of interest not to be enlarged by express trusts for raising same.

10. After the commencement of this Act no action, suit, or other proceeding shall be brought to recover any sum of money or legacy charged upon or payable out of any land or rent, at law or in equity, and secured by an express trust, or to recover any arrears of rent or of interest in respect of any sum of money or legacy so charged or payable and so secured, or any damages in respect of such arrears, except within the time within which the same would be recoverable if there were not any such trust. **1374.**

Short title.

11. This Act may be cited as the "Real Property Limitation Act, 1874." **1375.**

Commencement of Act.

12. This Act shall commence and come into operation on the first day of January, one thousand eight hundred and seventy-nine. **1376.**

TITLE III.

OF THE LEADING PRINCIPLES AND RULES OF EVIDENCE BY WHICH THE COURTS OF COMMON LAW ARE REGULATED, IN CIVIL CASES (*a*).

Direct and indirect evidence.

EVIDENCE is either direct or indirect. Direct evidence is that which directly proves a fact, by witnesses, things, or documents. Indirect or circumstantial evidence is that which only indirectly proves a fact, by way of inference; and it is either conclusive or presumptive, according as the fact to be proved is a necessary consequence, or is only a matter of probable inference. (Best, 24–5, 388; Powell, 48.) **1378.**

A fact is admissible as evidence, though it merely tends to raise an antecedent pro-

(*a*) In addition to the philosophic and highly instructive elementary treatise of Mr. Best, the compendious and able treatise of Mr. Powell, and the elaborate practical work of Mr. Roscoe on "Evidence at Nisi Prius," on which this concise statement of the leading principles of the Law of Evidence is founded, the reader is referred generally to the learned works of Mr. Phillips, Mr. Starkie, Judge Pitt Taylor, and others, on the same subject.

bability, or to negative an antecedent improbability. (*Fleet* v. *Murton*, L. R. 7 Q. B. 126.) **1379.**

Primary and secondary evidence.

Direct evidence is either primary or secondary. Primary evidence is that which constitutes the most original and the highest kind of proof. Secondary evidence is that which constitutes a derivative and inferior kind of proof, necessarily presupposing the existence of better proof not adduced. (Best, 388–9 ; Powell, 42 ; Rosc. 1, 4.) **1380.**

General rule as to the kind of evidence to be adduced.

It is a general rule that the highest kind, though not the fullest quantity, of evidence, of which the nature of the case admits, and which can be obtained, must be given ; and that secondary evidence is only admissible where primary evidence cannot be obtained. And hence a person may not adduce such evidence as necessarily presupposes the existence of a higher kind of evidence, of which he might have availed himself, but which he has kept back. (Best, 112–114, 579; Rosc. 1, 4 ; Powell, 4, 41–2, 45–6.) **1381.**

But, in general, direct evidence and indirect or circumstantial evidence are equally admissible. So that indirect or circumstantial evidence is admissible, even where direct evidence might have been produced, though the absence of direct evidence may be the

subject of comment to the jury. (Best, 389, 390.) **1382.**

When private documents are facts in issue, no derivative evidence of their contents is receivable until the absence of the original writing is accounted for. (Best, 299, 300; Powell, 41, 337, 356.) **1383.**

But when primary evidence cannot be had, or at least without such a degree of inconvenience as to amount to that which would be in the highest degree unreasonable, secondary evidence is receivable: as when an original document is destroyed or lost, or is in the possession of the adverse party who does not produce it after due notice, or of a party who is privileged to withhold it and insists on his privilege, or of a party who is out of the jurisdiction of the Court; or as in the case of documents of a public nature, such as records, court rolls, public books, registers of births, baptisms, marriages, deaths, and burials, of which, to prevent inconvenience, an exemplification or office copy, or a certified or examined copy, is sufficient evidence (*a*). (Best, 594, 600; Powell, 56, 280,

(*a*) On this subject see the "Act to amend the Law of Evidence with respect to Bankers' Books" (42 & 43 Vict. c. 111), repealing the Bankers' Books Evidence Act, 1876, 39 & 40 Vict. c. 48.

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299, 318, 319, 337, 356; Rosc. 92, 104–5, 108–110, 415.) **1384.**

Kind of secondary evidence which is receivable.

The law does not recognise any degrees in secondary evidence. A party entitled to resort to secondary evidence may in general resort to any form of it. Thus, the evidence of a witness who has read a destroyed or lost document is receivable, though a copy of it is in existence. But that which is adduced as evidence must really amount to legitimate proof; so that a copy of a copy is not receivable; and a copy, to be admissible, must be proved to be accurate by a person who made it, or compared it with the original. (Best, 597; Rosc. 12; Powell, 355–6.) **1385.**

Extrinsic evidence.

Extrinsic evidence is not in general admissible to contradict, add to, subtract from, vary, or explain a written contract. (See supra, par. 231–9; *The Beacon Assurance Co.*, 1 Moore P. C. (N. S.) 97.) **1386.**

Hearsay evidence.

Hearsay evidence (that is, a statement of what the witness has heard another say) is generally inadmissible. But it is admissible when that which was said constitutes part of the res gestæ, or the transaction which is in issue, and is explanatory of the nature of such transaction. The principle of the rule and of the exception may be thus explained:

when a witness attempts to prove a fact (*e.g.*, that A. was assaulted), by stating that another person told him so, this is not admissible; because it is not original, but derivative or second-hand evidence: it is an attempt to substitute a mere assertion of such other person, for the oath of such person, who ought to be produced as a witness, and, if produced, would be liable to cross-examination. But, where a witness states that he heard a person say something which constitutes a part of the transaction (whether before, or at the time of, or after the main circumstance which is the subject of the action), and is explanatory of the nature of the transaction (*e.g.*, that B., who struck A., used certain language, which showed he struck A. offensively, and not in play), such statement is admissible, to prove that such a thing was said; because, when so used, it is not derivative or second-hand evidence, but original evidence of a material fact, namely, that such a thing was said. And hearsay evidence is admissible as evidence of character. And (as we shall presently see) there are various other cases in which general reputation or the declarations of other persons may be adduced as evidence. (Rosc. 36, 39, 43; Powell, 84–8, 91, 94; Best, 611.)

1387.

Evidence on matters of public and general interest, by declarations of deceased persons, &c.

Matters of public and general interest—such as the boundaries of counties or parishes, rights of common, claims of highway, &c.—may be proved by common reputation, and even by the declarations of deceased persons who may be presumed to have had competent knowledge on the subject, if such declarations were made before any controversy arose. (Best, 613; Powell, 94, 103–4; Rosc. 39–43.) **1388.**

Evidence of pedigree, by such declarations, &c.

Matters of pedigree may be proved by declarations of deceased persons connected by blood or marriage with the family, if made before any controversy arose; by the general reputation of a family, proved by a surviving member of it; by entries in books made by members of the family; by correspondence between them; by recitals and descriptions in deeds and wills, inscriptions, genealogies, &c. (Best, 614; Rosc. 36–9; Powell, 112–122.) **1389.**

Declarations of deceased persons, in other cases.

Declarations made by deceased persons who had no interest to pervert the facts, and made them against their pecuniary or proprietary interest, are receivable in evidence, in proceedings against third parties. (Best, 615; Powell, 129, 131, 133; Rosc. 46; *The Queen* v. *Exeter*, L. R. 4 Q. B. 341.) **1390.**

Contemporaneous declarations made in and forming part of the regular course of business by deceased persons, who had a personal knowledge of the facts and no interest in misrepresenting the truth, are admissible in evidence. (Best, 616; Powell, 138, 144–5; Rosc. 45, 50–52.) **1391.**

Entries or memoranda.

Entries or memoranda are not admissible as evidence, per se, while the person who made them is living; but if produced in Court, they may be used by the person who made or examined them soon after the facts to which they relate, for the purpose of refreshing his memory. (Powell, 44, 45, 278, 361–3; Best, 301, 618; Rosc. 154.) **1392.**

Opinions of witnesses.

The opinions of witnesses are not in general admissible as evidence. But in matters of science, skill, trade, and peculiar knowledge, experts (that is, persons conversant with the subject) are often required to give their opinions. (Best, 627, 630; Powell, 61–3; Rosc. 153.) **1393.**

Self-serving and self-disserving evidence.

Self-serving evidence is not in general admissible; for it is a general rule that a man shall not be allowed to make evidence for himself: so that nothing said or done by a person who has an interest at the time will be evidence either for him or those who

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claim under him. But self-disserving statements, usually termed admissions, are ordinarily receivable in civil cases. (Best, 639, 651, 671; Powell, 111.) **1394.**

How much evidence is requisite.

In civil cases, subject to the rules as to the burden of proof, a mere preponderance of probability is a sufficient ground of decision; and slight evidence uncontradicted may become cogent proof. (Best, 120, 337.) **1395.**

Sufficiency of one witness.

The testimony of a single witness is sufficient in civil cases. And where an instrument is subscribed by several witnesses, it is generally sufficient to call one. But in the case of a will, all the witnesses to it who are in England and capable of being produced, are examined. (Best, 701, 719; Powell, 46, 361; Rosc. 116, 125.) **1396.**

Duty to give evidence.

No one (except the Sovereign) is exempted by his position, however exalted, from giving evidence. (Best, 168.) **1397.**

Evidence against public policy.

Some evidence is excluded on the ground of public policy, as tending to the public detriment. (Best, 732–3; Powell, 80–83; Rosc. 143; *Beatson* v. *Skene*, 5 Hurl. & Norm. 838.) **1398.**

Privileged communications.

As between a client and his counsel, or his solicitor, directly or through any other

person, communications, deeds, papers, and documents are privileged from disclosure, unless the client, whose privilege the right to withhold them is, waives it. And so are communications made by a person to any other person, if for the purpose of, or with a view to, actual or impending litigation, unless waived by the litigant. But no such privilege exists as between patients and medical men, or as regards secrets disclosed in the ordinary course of business or friendship. (Best, 734, 740; Powell, 73; Rosc. 11th ed. 106–8; *Cossey* v. *London, Brighton, &c., Ry. Co.*, L. R. 5 C. P. 146; *Fenner* v. *London & S. E. Ry. Co.*, L. R. 7 Q. B. 767.)

1399.

No presumption is to be made against the client on the ground of his insisting on this privilege. (*Wentworth* v. *Lloyd*, 10 H. L. Cas. 589.) **1400.**

Evidence tending to expose to a prosecution, penalty, or forfeiture.

Except in certain cases provided for by statute, a witness cannot be asked any question the answering which would have a tendency to expose him to a criminal prosecution or proceedings for a penalty or a forfeiture, unless by leave of the Court or Judge, and then only under peculiar circumstances. And if asked, he is not obliged to answer such a question. But a witness can-

& not of sound memory & understanding.

not refuse to answer a question on the ground that it may tend to show that he owes a debt, or is otherwise subject to a civil suit. (Best, 169–179; Powell, 68, 70; Rosc. 144; 46 Geo. III. c. 37; *Edmunds* v. *Greenwood*, L. R. 4 C. P. 70; *Villeboisnet* v. *Tobin*, L. R. 4 C. P. 184; *Inman* v. *Jenkins*, L. R. 5 C. P. 738.) **1401.**

Persons incompetent to give evidence.

A person is incompetent to give evidence while non compos mentis. (Best, 200–202.) But the testimony of an infant of tender years is receivable, if he understands the nature and obligation of an oath and the consequences of perjury. (Best, 212, 215; Powell, 21–2; Rosc. 135.) **1402.**

A person is deemed to be incompetent to be a witness, for want of religious belief, if he does not believe in a Supreme Being, who will punish perjury, either in this life or in the next. (Best, 221; Powell, 22–6; Rosc. 136.) **1403.**

Evidence of parties and their wives.

Parties to any civil proceeding, and the husbands and wives of the parties or of the persons on whose behalf the action or proceeding may be brought, opposed, or defended, may be examined on behalf of either or any of the parties therein. (14 & 15 Vict. c. 99, s. 2, 4; 16 & 17 Vict. c. 83, s. 1; 32 & 33 Vict. c. 68, s. 1–3; Best, 237, 243–4.) But

husbands and wives are not compellable to disclose any communication by the one to the other during the marriage. (Best, 243–4; Powell, 38, 344; Rosc. 139; 16 & 17 Vict. c. 83, s. 3.) And "no plaintiff in any action for breach of promise of marriage shall recover a verdict, unless his or her testimony shall be corroborated by some other material evidence in support of such promise." (32 & 33 Vict. c. 68, s. 2.) **1404.**

Evidence in support of action for breach of promise of marriage.

Crime is not now a ground of incompetency. (Best, 197; Powell, 27; Rosc. 136; 6 & 7 Vict. c. 85.) And evidence of the bad character of a witness is not ordinarily admissible. But the credibility of a witness may be impeached, but not by the party producing him, by general evidence that he is unworthy to be believed, even on oath, or by showing that he has been convicted of felony or misdemeanour. (Best, 350, 781–3; Powell, 446–448; Rosc. 144–5, 152; 17 & 18 Vict. c. 125, s. 22, 25, 103.) **1405.**

Objection to evidence on account of the character of the witness.

Pecuniary interest is not now a ground of incompetency to be a witness. But such an interest and certain social relations, whether of kindred or otherwise, and the desire of preserving the reputation of the witness or of others with whom he is identified, are all

Evidence of persons having a pecuniary interest, or those who are connected.

circumstances which may create a bias, and should be taken into account in estimating the value of testimony. (Best, 229, 263–5; Powell, 27–8; 6 & 7 Vict. c. 85.) **1406.**

Burden of proof.

The burden of proof lies on the party who asserts that which virtually constitutes the affirmative of the issue or question in dispute, though it may not be an affirmative in form, or may involve a negative: so that the party who denies the virtual affirmative need not give evidence in support of such denial, until the party asserting the affirmative has at least laid some probable grounds for belief of it. But this rule does not apply where the presumption is in favour of the party asserting the affirmative; nor where the case of the opposite party depends on a fact which is peculiarly within his own knowledge. And proof of a negative may be required, when it is not simple, but qualified by circumstances which are the matter in issue. (Best, 353, 356, 358–361, 363–4, 422; Powell, 181–4; Rosc. 89, 90.) **1407.**

As a general rule, the party alleging a breach of duty must prove it. (Powell, 183.) **1408.**

Acknowledgment of receipt of money.

The acknowledgment of receipt of money in the operative part of a deed or in a recital, is conclusive at Law between the

parties. But a receipt in writing, unless under seal (whether by indorsement on a deed or otherwise), and à fortiori, a mere verbal acknowledgment, is only primâ facie evidence, which may be rebutted, even by oral evidence. (Best, 505–6; Powell, 156; Sm. Law of Prop. 5th ed. par. 1839; Chit. Con. 669; Ad. Con. 1022–3.) (*a*). **1409.**

Plaintiff must prevail by the strength of his own case.

If a plaintiff succeed, it must be by the strength of his own right and the clearness of his own proof, and not through the want of right or the weakness of proof on the part of his adversary. (Best, 355; Rosc. 660.) **1410.**

Substance of issue must be proved.

It is sufficient if only the substance of the issue is proved. (Best, 371; Powell, 187; Rosc. 81.) **1411.**

What evidence may be rejected as irrelevant;

Evidence may be rejected as irrelevant, when it does not concern the relative conduct of the two parties, but that of one of them and a third party; or when it is not pertinent to the issue either directly or indirectly, nor tends to increase or diminish the damages; or when the connection between the fact to be proved and the evidentiary facts is too remote and conjectural; or when the evidence is not relevant to the pleadings or written

(*a*) As to estoppel, see Sm. Law of Prop. 5th ed. par. 2538–2550.

statements which the parties have made to enable the tribunal to see the points in dispute. And evidence is unnecessary when the facts have been admitted by the party, or his counsel, solicitor, agent, or partner, or by some one under whom he claims, on the record or otherwise, or decided by a verdict in an action between the same parties, or are noticed by the Courts, ex officio, or deemed notorious or presumed. An admission by a wife, however, will not bind her husband, unless she can be deemed to be his agent; nor will an admission by a guardian bind the infant. (Best, 340–342; Powell, 151–3, 156, 161–3, 220–221, 280, 288–9; Rosc. 59–62, 68, 70, 72, 74–76, 157–160; *Kirkstall Brewery Co.* v. *Furness Ry. Co.*, L. R. 9 Q. B. 468; and supra, par. 636, 636a.) **1412.**

or unnecessary.

Admission by a married woman or a guardian.

Evidence of character of the parties.

Evidence of the character of the parties is generally irrelevant and inadmissible in civil cases, unless it is of the substance of the issue. (Powell, 225; Rosc. 12th ed. 91, 190; Best, 344–5.) **1413.**

Where evidence in another proceeding is admissible.

The statement of a third person made on oath, in any kind of proceeding, or a verdict or judgment or decree in such proceeding, is not evidence against a person who was no party to such proceeding, and therefore had no opportunity of cross-examination, nor

was privy to one who was a party. But the depositions of a witness on a former trial may be used on a subsequent trial, where the same matter is in issue, and the parties are the same persons or their representatives, and the witness is dead, or cannot be found, or is prevented by illness from attending on the subsequent trial. (Best, 609, 621; Powell, 146, 278; Rosc. 100, 157–160, 166.) **1414.**

Different kinds of presumptions.

Some presumptions of law are conclusive, and cannot be rebutted; while others are inconclusive, and may be rebutted. And the latter may be divided into slight and strong, according as they are or are not of sufficient strength to shift the burden of proof. (Best, 406, 420; Powell, 51.) **1415.**

Presumption of knowledge of law, and of the consequences of acts.

It is presumed, conclusively, that all persons are acquainted with the law. And every person must be taken to intend the natural consequences of his acts. (Best, 440, 446; Powell, 53; Rosc. 27.) **1416.**

Presumption of that which is usual.

In many cases acts are presumed to be in accordance with the ordinary conduct of mankind, the habits of society, and the usages of trade, where there is no reason to suppose the contrary. (Best, 501–4.) **1417.**

Presumption of that

Where an instrument or act is susceptible

which is right.

of two constructions, the one involving that which is legal, and the other that which is illegal, the parties will be presumed to have intended the former. (Best, 449.) Indeed, persons are presumed to have acted rightly: so that non-performance of duty, irregularity, illegality, fraud, perjury, or other vice, misconduct, or wrong, is not to be presumed. (Best, 435, 447-8, 450–454, 460, 465; Rosc. 26, 35; Powell, 51.) Hence, no person is to be required to explain or contradict, until enough has been proved to warrant a reasonable and just conclusion against him, in the absence of explanation or contradiction. (Best, 448; Powell, 49.) And, on the same principle, the Courts are inclined to dispense with proof of circumstances which are essential to the validity of official and other acts, and by which they were probably accompanied in some instances. Thus, prior acts are sometimes inferred from posterior acts, and posterior acts from prior acts, and intermediate acts from antecedent and subsequent acts. (Best, 456.) **1418.**

Presumption from possession or receipt of rent.

Possession, or quasi possession, or receipt of rent from the person in possession, as the case may be, is primâ facie evidence of property. (Best, 465; Rosc. 31, 660; *Asher* v. *Whitlock*, L. R. 1 Q. B. 1, 7.) **1419.**

Evidence from ancient documents.

Ancient documents proved to have come from the proper custody, and purporting to be a part of the transactions to which they relate, are evidence of those transactions. (Powell, 106, 110.) **1420.**

Presumption of receipt of a letter.

The posting of a letter is primâ facie proof of its receipt in due time. It is not conclusive, unless made so by statute. (Best, 503; *Re Constantinople and Alexandria Hotel Co., Reidpath's Case*, L. R. 11 Eq. 86.) **1421.**

Presumption of payment.

Any considerable and unnecessary lapse of time, without demand of payment, and without any acknowledgment of the existence of a debt, affords primâ facie presumption of payment. (Ad. Con. 912.) **1422.**

Presumption of continuance of the same state of things.

The presumption, in the absence of evidence to the contrary, is in favour of the continuance of things in the same state in which they are proved to have existed. (Best, 504; Rosc. 27.) **1423.**

Presumption with reference to life or death.

There is no presumption of law in favour of the continuance of life, though there may be grounds for inferring it. But when a person goes abroad, or leaves his usual place of resort, and has not been heard of for seven years, there is a presumption of law that he is dead. (Best, 508; Powell, 57; Rosc. 34; *In re Phene's Trusts*, L. R. 5 Ch. Ap. 139.) **1424.**

Presumption as to stamp.

In the absence of evidence to the contrary, a document which is lost or not produced on notice, will be presumed to have been duly stamped. So that the burden of proof as to the stamp is on the party who alleges the instrument to have been unstamped to establish that fact. But if there is evidence that at a particular time the instrument was unstamped, the burden of proof is shifted to the party who alleges that it was stamped to prove that fact. (*The Marine Investment Co.* v. *Haviside*, L. R. 5 H. L. 624; Best, 310; Powell, 356; Rosc. 36.) **1425.**

Proof of deeds, wills, and other documents.

The execution of a deed, if attestation was necessary, must be proved by at least one of the attesting witnesses, notwithstanding the testimony of third persons, or an admission of the party by whom it was executed, except it be a formal admission made inter partes for the purpose of the trial. If an attesting witness is satisfied as to his signature, and says he is therefore sure he saw the instrument executed, recollection of the execution is not necessary. If the witnesses are dead, or insane, or out of the jurisdiction of the Court, or cannot be found, proof may be given of their handwriting. (Best, 294–5; Powell, 46; Rosc. 114–117.) **1426.**

Documents attested, but not requiring

attestation, may be proved as if not attested. (Rosc. 111, 112, 114; Best, 295–6; Powell, 359–361, 363; 17 & 18 Vict. c. 125, s. 26, 103.) **1427.**

Where there is no attesting witness to an instrument, it is usually proved by evidence of the handwriting of the party. (Best, 296.) **1428.**

A probate is evidence of the validity and contents of a will of personal estate. (Rosc. 12th ed. 127.) And by the stat. 20 & 21 Vict. c. 77, s. 64, it is enacted as follows: "In any action at Law, or suit in Equity, where, according to the existing law, it would be necessary to produce and prove an original will in order to establish a devise or other testamentary disposition of or affecting real estate, it shall be lawful for the party intending to establish in proof such devise or other testamentary disposition, to give to the opposite party, ten days at least before the trial or other proceedings in which the said proof shall be intended to be adduced, notice that he intends at the said trial or other proceeding to give in evidence, as proof of the devise or other testamentary disposition, the probate of the said will, or the letters of administration with the will annexed, or a copy

thereof stamped with any seal of the Court of Probate; and in every such case such probate, or letters of administration, or a copy thereof respectively, stamped as aforesaid, shall be sufficient evidence of such will, and of its validity and contents, notwithstanding the same may not have been proved in solemn form, or to have been otherwise declared valid in a contentious cause or matter, as herein provided, unless the party receiving such notice shall, within four days after such receipt, give notice that he disputes the validity of such devise or other testamentary disposition." **1429.**

No proof is required of a deed, will or other document more than thirty years old, and coming from a custody in which it was not unreasonable to expect to find it, though it might not be the most proper custody. But if attested, the opposite party may call the attesting witness to show that it was not duly executed. (Best, 295, 461; Powell, 135, 297, 360; Rosc. 120–1, 127.) **1430.**

How judgment as to handwriting may be formed.

Judgment as to the genuineness of handwriting may be formed from having seen the person write on former occasions; or from having corresponded with him, or had other opportunities of seeing his handwriting; or

from a comparison of the handwriting in question with other documents proved to have been written or signed by him. (Best, 316, 318, 322, 323, 329; Powell, 357; Rosc. 119–120; 17 & 18 Vict. c. 125, s. 27, 103.) **1431.**

Right to have context read.

Where part of a document or statement is used against a person, he has a right to have the whole of it laid before the Court, so far as it bears upon the part so used. (Best, 640; Powell, 277.) **1432.**

Evidence from a record.

That part of a record which states what has taken place cannot be disputed. But the judicial part is in general only evidence against those who are parties or privy to the proceeding. (Best, 742–3; Rosc. 157–8.) **1433.**

Right to inspect and copy documents.

Either party, in a civil proceeding in the superior Courts, is entitled to an inspection of documents, in the possession of the opposite party, which relate to his own case alone, or to the cases of both parties conjointly, and to take copies of such documents. (Best, 752–3; Powell, 331–7.) **1434.**

Notice to produce documents.

When documents required as evidence are in the possession of the adverse party, a notice to produce them should be served on him; and if he does not produce them, secondary evidence of their contents may

be given. If they are in the possession of a third person, he may be served with a subpœna duces tecum, *i.e.*, a summons to attend the trial as a witness, and bring the documents with him. But a person need not produce documents, if the disclosure would involve a breach of professional confidence, or might subject him to a criminal prosecution, penalty, or forfeiture, or loss of his estate or interest. So that a person or his solicitor need not produce the muniments of title to his estate, but secondary evidence of their contents may be given. (Best, 289–290; Powell, 337–8; Rosc. 7, 133.) **1435.**

Where communications are made in writing in the course and as part of the duty of an officer or agent or a servant, whether an action is pending or not, and whether they contain facts or opinions, they must be produced. But if they are made confidentially, and for the purpose of litigation, and not in the ordinary course of the duty of the person making them, they are privileged. (*Woolley* v. *North London Ry. Co.*, L. R. 4 C. P. 602, 611, 614.) **1436.**

Notice to admit documents.

Either party may call on the other party, by notice, to admit any document, saving all just exceptions; and in case of refusal

or neglect to admit it, the costs of proving the document must be paid by the party so neglecting or refusing, whatever the result of the cause may be, unless the judge certifies that the refusal to admit it was reasonable. (Best, 759; Powell, 168–9; 15 & 16 Vict. c. 76, s. 117.) **1437.**

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APPENDIX.

36 & 37 Vict. Cap. 66.

The Supreme Court of Judicature Act, 1873.

SECTION 24.

Law and Equity to be concurrently administered.

In every civil cause or matter commenced in the High Court of Justice law and equity shall be administered by the High Court of Justice and the Court of Appeal respectively according to the Rules following:—

(1.) If any plaintiff or petitioner claims to be entitled to any equitable estate or right, or to relief upon any equitable ground against any deed, instrument, or contract, or against any right, title, or claim whatsoever asserted by any defendant or respondent in such cause or matter, or to any relief founded upon a legal right, which heretofore could only have been given by a Court of Equity, the said Courts respectively, and every Judge thereof, shall give to such plaintiff or petitioner such and the same relief as ought to have been given by the Court of Chancery in a suit or proceeding for the same or the like purpose properly instituted before the passing of this Act.

(2.) If any defendant claims to be entitled to any equitable estate or right, or to relief upon any equitable ground against any deed, instrument, or contract, or against any right, title, or claim asserted by any plaintiff or petitioner in such cause or matter, or alleges any ground of equitable defence to any claim of the plaintiff or petitioner in such cause or matter, the said Courts respectively, and every Judge thereof, shall give to every equitable estate, right, or ground of relief so claimed, and to every equitable defence so alleged, such and the same effect by way of defence against the claim of such plaintiff or petitioner, as the Court of Chancery ought to have given if the same or the like matters had been relied on by way of defence in any suit or proceeding instituted in that Court for the same or the like purpose before the passing of this Act.

(3.) The said Courts respectively, and every Judge thereof, shall also have power to grant to any defendant in respect of any equitable estate or right, or other matter of equity, and also in respect of any legal estate, right, or title claimed or asserted by him, all such relief against any plaintiff or petitioner as such defendant shall have properly claimed by his pleading, and as the said Courts respectively, or any Judge thereof, might have granted in any suit instituted for that purpose by the same defendant against the same plaintiff or petitioner; and also all such relief relating to or connected with the original subject of the cause or matter, and in like

manner claimed against any other person, whether already a party to the same cause or matter or not, who shall have been duly served with notice in writing of such claim pursuant to any Rule of Court or any Order of the Court, as might properly have been granted against such person if he had been made a defendant to a cause duly instituted by the same defendant for the like purpose; and every person served with any such notice shall thenceforth be deemed a party to such cause or matter, with the same rights in respect of his defence against such claim, as if he had been duly sued in the ordinary way by such defendant.

(4.) The said Courts respectively, and every Judge thereof, shall recognise and take notice of all equitable estates, titles, and rights, and all equitable duties and liabilities appearing incidentally in the course of any cause or matter, in the same manner in which the Court of Chancery would have recognised and taken notice of the same in any suit or proceeding duly instituted therein before the passing of this Act.

(5.) No cause or proceeding at any time pending in the High Court of Justice, or before the Court of Appeal, shall be restrained by prohibition or injunction; but every matter of equity on which an injunction against the prosecution of any such cause or proceeding might have been obtained, if this Act had not passed, either unconditionally or on any terms or conditions, may be relied on by way of defence thereto: Provided

always, that nothing in this Act contained shall disable either of the said Courts from directing a stay of proceedings in any cause or matter pending before it if it shall think fit; and any person, whether a party or not to any such cause or matter, who would have been entitled, if this Act had not passed, to apply to any Court to restrain the prosecution thereof, or who may be entitled to enforce, by attachment or otherwise, any judgment, decree, rule, or order, contrary to which all or any part of the proceedings in such cause or matter may have been taken, shall be at liberty to apply to the said Courts respectively, by motion in a summary way, for a stay of proceedings in such cause or matter, either generally, or so far as may be necessary for the purposes of justice; and the Court shall thereupon make such order as shall be just.

(6.) Subject to the aforesaid provisions for giving effect to equitable rights and other matters of equity in manner aforesaid, and to the other express provisions of this Act, the said Courts respectively, and every Judge thereof, shall recognise and give effect to all legal claims and demands, and all estates, titles, rights, duties, obligations, and liabilities existing by the common law or by any custom, or created by any statute, in the same manner as the same would have been recognised and given effect to if this Act had not passed, by any of the Courts whose jurisdiction is hereby transferred to the said High Court of Justice.

(7.) The High Court of Justice and the Court

of Appeal respectively, in the exercise of the jurisdiction vested in them by this Act in every cause or matter pending before them respectively, shall have power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as to them shall seem just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them respectively in such cause or matter; so that, as far as possible, all matters so in controversy between the said parties respectively may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided.

SECTION 25.

Rules of law upon certain points.

And whereas it is expedient to take occasion of the union of the several Courts whose jurisdiction is thereby transferred to the said High Court of Justice to amend and declare the law to be hereafter administered in England as to the matters next hereinafter mentioned; Be it enacted as follows :—

Administration of assets of insolvent estates.

(1.) [By the Supreme Court of Judicature Act, 1875 (38 & 39 Vict. c. 77, s. 10), an enactment is made in lieu of this 1st sub-section; for which see supra, par. 1054.]

Statutes of Limitation inapplicable to express trusts.

(2.) No claim of a cestui que trust against his trustee for any property held on an express trust, or in respect of any branch of such trust, shall be held to be barred by any Statute of Limitations.

Equitable waste.

(3). An estate for life without impeachment of waste shall not confer or be deemed to have conferred upon the tenant for life any legal right to commit waste of the description known as equitable waste, unless an intention to confer such right shall expressly appear by the instrument creating such estate.

Merger.

(4.) There shall not, after the commencement of this Act, be any merger by operation of law only of any estate, the beneficial interest in which would not be deemed to be merged or extinguished in equity.

Suits for possession of land by mortgagors.

(5.) A mortgagor entitled for the time being to the possession or receipt of the rents and profits of any land as to which no notice of his intention to take possession or to enter into the receipt of the rents and profits thereof shall have been given by the mortgagee, may sue for such possession, or for the recovery of such rents or profits, or to prevent or recover damages in respect of any trespass or other wrong relative thereto, in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person.

Assignment of debts and choses in action.

(6.) Any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be, and be deemed to have been effectual in law (subject to

all equities which would have been entitled to priority over the right of the assignee if this Act had not passed,) to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor: Provided always, that if the debtor, trustee, or other person liable in respect of such debt or chose in action shall have had notice that such assignment is disputed by the assignor or any one claiming under him, or of any other opposing or conflicting claims to such debt or chose in action, he shall be entitled, if he think fit, to call upon the several persons making claim thereto to interplead concerning the same, or he may, if he think fit, pay the same into the High Court of Justice under and in conformity with the provisions of the Acts for the relief of trustees.

Stipulation not of the essence of contracts.

(7.) Stipulations in contracts, as to time or otherwise, which would not before the passing of this Act have been deemed to be or to have become of the essence of such contracts in a Court of Equity, shall receive in all Courts the same construction and effect as they would have heretofore received in Equity.

Injunctions and receivers.

(8.) A mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made; and any such order may be made either unconditionally or

upon such terms and conditions as the Court shall think just; and if an injunction is asked, either before, or at, or after the hearing of any cause or matter, to prevent any threatened or apprehended waste or trespass, such injunction may be granted, if the Court shall think fit, whether the person against whom such injunction is sought is or is not in possession under any claim or title or otherwise, or (if out of possession) does or does not claim a right to do the act sought to be restrained under any colour of title, and whether the estates claimed by both or by either of the parties are legal or equitable.

Damages by collisions at sea.

(9.) In any cause or proceeding for damages arising out of a collision between two ships, if both ships shall be found to have been in fault, the rules hitherto in force in the Court of Admiralty, so far as they have been at variance with the rules in force in the Courts of Common Law, shall prevail.

Infants.

(10.) In questions relating to the custody and education of infants the rules of Equity shall prevail.

Cases of conflict not enumerated.

(11.) Generally in all matters not hereinbefore particularly mentioned, in which there is any conflict or variance between the rules of Equity and the rules of the Common Law with reference to the same matter, the rules of Equity shall prevail.

SECTION 89.

Powers of inferior Courts having Equity and Admiralty jurisdiction.

Every inferior Court which now has or which may after the passing of this Act have jurisdiction in Equity, or at Law and in Equity, and in Admiralty respectively, shall, as regards all causes of action within its jurisdiction for the time being, have power to grant, and shall grant in any proceeding before such Court, such relief, redress, or remedy, or combination of remedies, either absolute or conditional, and shall in every such proceeding give such and the like effect to every ground of defence or counter-claim, equitable or legal (subject to the provision next hereinafter contained), in as full and ample a manner as might and ought to be done in the like case by the High Court of Justice.

SECTION 90.

Counter-claims in inferior Courts, and transfers therefrom.

Where in any proceeding before any such inferior Court any defence or counter-claim of the defendant involves matter beyond the jurisdiction of the Court, such defence or counter-claim shall not affect the competence or the duty of the Court to dispose of the whole matter in controversy so far as relates to the demand of the plaintiff and the defence thereto, but no relief exceeding that which the Court has jurisdiction to administer shall be given to the defendant upon any such counter-claim: Provided always, that in such case it shall be lawful for the High

Court, or any Division or Judge thereof, if it shall be thought fit, on the application of any party to the proceeding, to order that the whole proceeding be transferred from such inferior Court to the High Court, or to any Division thereof; and in such case the record in such proceeding shall be transmitted by the Registrar, or other proper officer, of the inferior Court to the said High Court; and the same shall thenceforth be continued and prosecuted in the said High Court as if it had been originally commenced therein.

SECTION 91.

Rules of law to apply to inferior Courts.

The several rules of law enacted and declared by this Act shall be in force and receive effect in all Courts whatsoever in England, so far as the matters to which such rules relate shall be respectively cognisable by such Courts.

33 & 34 Vict. Cap. 93.

An Act to amend the Law relating to the Property of Married Women.

[9th August, 1870.]

Whereas it is desirable to amend the law of property and contract with respect to married women:

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Earnings of married women to be deemed their own property.

1. The wages and earnings of any married woman acquired or gained by her after the passing of this Act in any employment, occupation, or trade in which she is engaged or which she carries on separately from her husband, and also any money or property so acquired by her through the exercise of any literary, artistic, or scientific skill, and all investments of such wages, earnings, money, or property, shall be deemed and taken to be property held and settled to her separate use, independent of any husband to whom she may be married, and her receipts alone shall be a good discharge for such wages, earnings, money, and property.

Deposits in savings

2. Notwithstanding any provision to the con-

banks by a married woman to be deemed her separate property.

trary in the Act of the tenth year of George the Fourth, chapter twenty-four, enabling the Commissioners for the Reduction of the National Debt to grant life annuities and annuities for terms of years, or in the Acts relating to savings banks and post-office savings banks, any deposit hereafter made and any annuity granted by the said Commissioners under any of the said Acts in the name of a married woman, or in the name of a woman who may marry after such deposit or grant, shall be deemed to be the separate property of such woman, and the same shall be accounted for and paid to her as if she were an unmarried woman; provided that if any such deposit is made by, or such annuity granted to, a married woman by means of moneys of her husband without his consent, the Court may, upon an application under section nine of this Act, order such deposit or annuity, or any part thereof, to be paid to the husband.

Proviso.

As to a married woman's property in the funds.

3. Any married woman, or any woman about to be married, may apply to the Governor and Company of the Bank of England, or to the Governor and Company of the Bank of Ireland, by a form to be provided by the governor of each of the said banks and company for that purpose, that any sum forming part of the public stocks and funds, and not being less than twenty pounds, to which the woman so applying is entitled, or which she is about to acquire, may be transferred to or made to stand in the books of the governor and company to whom such application is made in the name or intended name of

the woman as a married woman entitled to her separate use, and on such sum being entered in the books of the said governor and company accordingly, the same shall be deemed to be the separate property of such woman, and shall be transferred and the dividends paid as if she were an unmarried woman; provided that if any such investment in the funds is made by a married woman by means of moneys of her husband without his consent, the Court may, upon an application under section nine of this Act, order such investment and the dividends thereof, or any part thereof, to be transferred and paid to the husband.

As to a married woman's property in a joint-stock company.

4. Any married woman, or any woman about to be married, may apply in writing to the directors or managers of any incorporated or joint-stock company that any fully paid-up shares, or any debenture or debenture stock, or any stock of such company, to the holding of which no liability is attached, and to which the woman so applying is entitled, may be registered in the books of the said company in the name or intended name of the woman as a married woman entitled to her separate use, and it shall be the duty of such directors or managers to register such shares or stock accordingly, and the same upon being so registered shall be deemed to be the separate property of such woman, and shall be transferred and the dividends and profits paid as if she were an unmarried woman; provided that if any such investment as last mentioned is made by a married woman by means of moneys

of her husband without his consent, the Court may, upon an application under section nine of this Act, order such investment and the dividends and profits thereon, or any part thereof, to be transferred and paid to the husband.

As to a married woman's property in a society.

5. Any married woman, or any woman about to be married, may apply in writing to the committee of management of any industrial and provident society, or to the trustees of any friendly society, benefit building society, or loan society, duly registered, certified, or enrolled under the Acts relating to such societies respectively, that any share, benefit, debenture, right, or claim whatsoever in, to, or upon the funds of such society, to the holding of which share, benefit, or debenture no liability is attached, and to which the woman so applying is entitled, may be entered in the books of the society in the name or intended name of the woman as a married woman entitled to her separate use, and it shall be the duty of such committee or trustees to cause the same to be so entered, and thereupon such share, benefit, debenture, right, or claim shall be deemed to be the separate property of such woman, and shall be transferable and payable with all dividends and profits thereon as if she were an unmarried woman; provided that if any such share, benefit, debenture, right, or claim has been obtained by a married woman by means of moneys of her husband without his consent, the Court may, upon an application under section nine of this Act, order the same and the dividends and pro-

fits thereon, or any part thereof, to be transferred and paid to the husband.

Deposit of moneys in fraud of creditors invalid.

6. Nothing hereinbefore contained in reference to moneys deposited in or annuities granted by saving banks, or moneys invested in the funds or in shares or stock of any company, shall, as against creditors of the husband, give validity to any deposit or investment of moneys of the husband made in fraud of such creditors, and any moneys so deposited or invested may be followed as if this Act had not passed.

Personal property coming to a married woman to be her own.

7. Where any woman married after the passing of this Act shall during her marriage become entitled to any personal property as next of kin or one of the next of kin of an intestate, or to any sum of money not exceeding two hundred pounds under any deed or will, such property shall, subject and without prejudice to the trusts of any settlement affecting the same, belong to the woman for her separate use, and her receipts alone shall be a good discharge for the same.

Freehold property coming to a married woman, rents and profits only to be her own.

8. Where any freehold, copyhold, or customaryhold property shall descend upon any woman married after the passing of this Act as heiress or co-heiress of an intestate, the rents and profits of such property shall, subject and without prejudice to the trusts of any settlement affecting the same, belong to such woman for her separate use, and her receipts alone shall be a good discharge for the same.

How questions as to ownership

9. In any question between husband and wife as to property declared by this Act to be

of property to be settled.

the separate property of the wife, either party may apply by summons or motion in a summary way either to the Court of Chancery in England or Ireland, according as such property is in England or Ireland, or in England (irrespective of the value of the property) the Judge of the County Court of the district in which either party resides, and thereupon the Judge may make such order, direct such inquiry, and award such costs, as he shall think fit; provided that any order made by such Judge shall be subject to appeal in the same manner as the order of the same Judge made in a pending suit or on an equitable plaint would have been, and the Judge may, if either party so require, hear the application in his private room.

Married woman may effect policy of insurance.

10. A married woman may effect a policy of insurance upon her own life or the life of her husband for her separate use, and the same and all benefit thereof, if expressed on the face of it to be so effected, shall enure accordingly, and the contract in such policy shall be as valid as if made with an unmarried woman.

As to insurance of a husband for benefit of his wife.

A policy of insurance effected by any married man on his own life, and expressed upon the face of it to be for the benefit of his wife or of his wife and children, or any of them, shall enure and be deemed a trust for the benefit of his wife for her separate use, and of his children, or any of them, according to the interest so expressed, and shall not, so long as any object of the trust remains, be subject to the control of the husband or to his creditors, or form part

of his estate. When the sum secured by the policy becomes payable, or at any time previously, a trustee thereof may be appointed by the Court of Chancery in England or in Ireland, according as the policy of insurance was effected in England or in Ireland, or in England by the Judge of the County Court of the district, or in Ireland by the Chairman of the Civil Bill Court of the division of the county in which the insurance office is situated, and the receipt of such trustee shall be a good discharge to the office. If it shall be proved that the policy was effected and premiums paid by the husband with intent to defraud his creditors, they shall be entitled to receive out of the sum secured an amount equal to the premiums so paid.

Married women may maintain an action.

11. A married woman may maintain an action in her own name for the recovery of any wages, earnings, money, and property by this Act declared to be her separate property, or of any property belonging to her before marriage, and which her husband shall, by writing under his hand, have agreed with her shall belong to her after marriage as her separate property, and she shall have in her own name the same remedies, both civil and criminal, against all persons whomsoever for the protection and security of such wages, earnings, money, and property, and of any chattels or other property purchased or obtained by means thereof for her own use, as if such wages, earnings, money, chattels, and property belonged to her as an unmarried woman; and in any indictment or other proceeding it

shall be sufficient to allege such wages, earnings, money, chattels, and property to be her property.

Husband not to be liable on his wife's contracts before marriage.

12. A husband shall not, by reason of any marriage which shall take place after this Act has come into operation, be liable for the debts of his wife contracted before marriage, but the wife shall be liable to be sued for, and any property belonging to her for her separate use shall be liable to satisfy, such debts as if she had continued unmarried (*a*).

Married woman to be liable to the parish for the maintenance of her husband.

13. Where in England the husband of any woman having separate property becomes chargeable to any union or parish, the justices having jurisdiction in such union or parish may, in petty sessions assembled, upon application of the guardians of the poor, issue a summons against the wife, and make and enforce such order against her for the maintenance of her husband as, by the thirty-third section of "The Poor Law Amendment Act, 1868," they may now make and enforce against a husband for the maintenance of his wife who becomes chargeable to any union or parish. Where in Ireland relief is given, under the provisions of the Acts relating to the relief of the destitute poor, to the husband of any woman having separate property, the cost price of such relief is hereby declared to be a loan from the guardians of the union in which the same shall be given, and shall be recoverable from such woman as if she were a feme

(*a*) See infra, page 637, *et seq.*

sole by such and the same actions and proceedings as money lent.

14. A married woman having separate property shall be subject to all such liability for the maintenance of her children as a widow is now by law subject to for the maintenance of her children: Provided always, that nothing in this Act shall relieve her husband from any liability at present imposed upon him by law to maintain her children. Married woman to be liable to the parish for the maintenance of her children.

15. This Act shall come into operation at the time of the passing of this Act. Commencement of Act.

16. This Act shall not extend to Scotland. Extent of Act.

17. This Act may be cited as the "Married Women's Property Act, 1870." Short title.

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37 & 38 Vict. Cap. 50.

An Act to amend the Married Women's Property Act (1870).

[30th July, 1874.]

Whereas it is not just that the property which a woman has at the time of her marriage should pass to her husband, and that he should not be liable for her debts contracted before marriage, and the law as to the recovery of such debts requires amendment:

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons,

in this present Parliament assembled, and by the authority of the same, as follows :—

Husband and wife may be jointly sued for her debts before marriage.

1. So much of the Married Women's Property Act, 1870, as enacts that a husband shall not be liable for the debts of his wife contracted before marriage is repealed so far as respects marriages which shall take place after the passing of this Act, and a husband and wife married after the passing of this Act may be jointly sued for any such debt.

Extent to which husband liable.

2. The husband shall, in such action and in any action brought for damages sustained by reason of any tort committed by the wife before marriage or by reason of the breach of any contract made by the wife before marriage, be liable for the debt or damages respectively to the extent only of the assets hereinafter specified; and in addition to any other plea or pleas may plead that he is not liable to pay the debt or damages in respect of any such assets as hereinafter specified; or, confessing his liability to some amount, that he is not liable beyond what he so confesses; and if no such plea is pleaded the husband shall be deemed to have confessed his liability so far as assets are concerned.

If husband without assets he shall have judgment for costs.

3. If it is not found in such action that the husband is liable in respect of any such assets, he shall have judgment for his costs of defence, whatever the result of the action may be against the wife.

Joint and separate judgment against husband and

4. When a husband and wife are sued jointly, if by confession or otherwise it appears that the husband is liable for the debt or damages

recovered, or any part thereof, the judgment to the extent of the amount for which the husband is liable shall be a joint judgment against the husband and wife, and as to the residue, if any, of such debt or damages, the judgment shall be a separate judgment against the wife. wife for debt.

5. The assets in respect of and to the extent of which the husband shall in any such action be liable are as follows :— Assets for which husband liable.

(1.) The value of the personal estate in possession of the wife, which shall have vested in the husband :

(2.) The value of the choses in action of the wife which the husband shall have reduced into possession, or which with reasonable diligence he might have reduced into possession :

(3.) The value of the chattels real of the wife which shall have vested in the husband and wife :

(4.) The value of the rents and profits of the real estate of the wife which the husband shall have received, or with reasonable diligence might have received :

(5.) The value of the husband's estate or interest in any property, real or personal, which the wife in contemplation of her marriage with him shall have transferred to him or to any other person :

(6.) The value of any property, real or personal, which the wife in contemplation of her marriage with the husband shall

with his consent have transferred to any person with the view of defeating or delaying her existing creditors:

Provided that when the husband after marriage pays any debt of his wife, or has a judgment bonâ fide recovered against him in any such action as is in this Act mentioned, then to the extent of such payment or judgment the husband shall not in any subsequent action be liable.

Extent of Act.

6. This Act shall not extend to Scotland.

Short title.

7. This Act may be cited as the "Married Women's Property Act (1870) Amendment Act, 1874."

37 & 38 Vict. Cap. 62.

An Act to amend the Law as to the Contracts of Infants.

[7th August, 1874.]

Whereas it is expedient to amend the law as to the contracts of infants, and as to the ratification made by persons of full age of contracts made by them during infancy, and as to necessaries:

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Contracts by infants, except for necessaries, to be void.

1. All contracts, whether by specialty or by simple contract, henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessaries), and all accounts stated with infants, shall be absolutely void: Provided always, that this enactment shall not invalidate any contract into which an infant may, by any existing or future statute, or by the rules of Common Law or Equity, enter, except such as now by law are voidable.

No action to be brought on ratifica-

2. No action shall be brought whereby to charge any person upon any promise made after

tion of infant's contract.

full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age (*a*).

Short title.

3. This Act may be cited as "The Infants Relief Act, 1874."

(*a*) This applies to ratifications made after the passing of the Act, even of contracts made before that time, *Ex parte Kibble, In re Onslow*, L. R. 10 Ch. Ap. 373, and extends to mere ratifications of promises of marriage, however clear, without evidence of any fresh promise, though there may have been a ratification from day to day. (*Coxhead* v. *Mullis*, L. R. 3 C. P. D. 439.)

43 & 44 Vict. Cap. 42.

An Act to extend and regulate the Liability of Employers to make Compensation for Personal Injuries suffered by Workmen in their service.

[7th September, 1880.]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Amendment of law.

1. Where after the commencement of this Act personal injury is caused to a workman—

(1.) By reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer; or

(2.) By reason of the negligence of any person in the service of the employer who has any superintendence entrusted to him whilst in the exercise of such superintendence; or

(3.) By reason of the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to

conform, and did conform, where such injury resulted from his having so conformed; or

(4.) By reason of the act or omission of any person in the service of the employer done or made in obedience to the rules or byelaws of the employer, or in obedience to particular instructions given by any person delegated with the authority of the employer in that behalf; or

(5.) By reason of the negligence of any person in the service of the employer who has the charge or control of any signal, points, locomotive engine, or train upon a railway,

the workman, or in case the injury results in death, the legal personal representatives of the workman, and any persons entitled in case of death, shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer, nor engaged in his work.

Exceptions to amendment of law.

2. A workman shall not be entitled under this Act to any right of compensation or remedy against the employer in any of the following cases; that is to say,

(1.) Under sub-section one of section one, unless the defect therein mentioned arose from, or had not been discovered or remedied owing to the negligence of the employer, or of some person in the

service of the employer, and entrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition.

(2.) Under sub-section four of section one, unless the injury resulted from some impropriety or defect in the rules, byelaws, or instructions therein mentioned; provided that where a rule or byelaw has been approved or has been accepted as a proper rule or byelaw by one of Her Majesty's Principal Secretaries of State, or by the Board of Trade or any other department of the Government, under or by virtue of any Act of Parliament, it shall not be deemed for the purposes of this Act to be an improper or defective rule or byelaw.

(3.) In any case where the workman knew of the defect or negligence which caused his injury, and failed within a reasonable time to give, or cause to be given, information thereof to the employer or some person superior to himself in the service of the employer, unless he was aware that the employer or such superior already knew of the said defect or negligence.

Limit of sum recoverable as compensation.

3. The amount of compensation recoverable under this Act shall not exceed such sum as may be found to be equivalent to the estimated earnings, during the three years preceding the injury, of a person in the same grade employed

during those years in the like employment and in the district in which the workman is employed at the time of the injury.

Limit of time for recovery of compensation.

4. An action for the recovery under this Act of compensation for an injury shall not be maintainable unless notice that injury has been sustained is given within six weeks, and the action is commenced within six months from the occurrence of the accident causing the injury, or, in case of death, within twelve months from the time of death: Provided always, that in case of death the want of such notice shall be no bar to the maintenance of such action if the judge shall be of opinion that there was reasonable excuse for such want of notice.

Money payable under penalty to be deducted from compensation under Act.

5. There shall be deducted from any compensation awarded to any workman, or representatives of a workman, or persons claiming by, under, or through a workman in respect of any cause of action arising under this Act, any penalty or part of a penalty which may have been paid in pursuance of any other Act of Parliament to such workman, representatives, or persons in respect of the same cause of action; and where an action has been brought under this Act by any workman, or the representatives of any workman, or any persons claiming by, under, or through such workman, for compensation in respect of any cause of action arising under this Act, and payment has not previously been made of any penalty or part of a penalty under any other Act of Parliament in respect of the same cause of action, such workman, representatives, or persons shall

not be entitled thereafter to receive any penalty or part of a penalty under any other Act of Parliament in respect of the same cause of action.

Trial of actions.

6. (1.) Every action for recovery of compensation under this Act shall be brought in a county court, but may, upon the application of either plaintiff or defendant, be removed into a superior court in like manner and upon the same conditions as an action commenced in a county court may by law be removed.

(2.) Upon the trial of any such action in a county court before the judge without a jury one or more assessors may be appointed for the purpose of ascertaining the amount of compensation.

(3.) For the purpose of regulating the conditions and mode of appointment and remuneration of such assessors, and all matters of procedure relating to their duties, and also for the purpose of consolidating any actions under this Act in a county court, and otherwise preventing multiplicity of such actions, rules and regulations may be made, varied, and repealed from time to time in the same manner as rules and regulations for regulating the practice and procedure in other actions in county courts.

"County court" shall, with respect to Scotland, mean the "Sheriff's Court," and shall, with respect to Ireland, mean the "Civil Bill Court."

In Scotland any action under this Act may be removed to the Court of Session at the instance of either party, in the manner provided by, and subject to the conditions prescribed by, section nine of the Sheriff Courts (Scotland) Act, 1877. 40 & 41 Vict. c. 50.

In Scotland the sheriff may conjoin actions arising out of the same occurrence or cause of action, though at the instance of different parties and in respect of different injuries.

Mode of serving notice of injury.

7. Notice in respect of an injury under this Act shall give the name and address of the person injured, and shall state in ordinary language the cause of the injury and the date at which it was sustained, and shall be served on the employer, or, if there is more than one employer, upon one of such employers.

The notice may be served by delivering the same to or at the residence or place of business of the person on whom it is to be served.

The notice may also be served by post by a registered letter addressed to the person on whom it is to be served at his last known place of residence or place of business; and, if served by post, shall be deemed to have been served at the time when a letter containing the same would be delivered in the ordinary course of post; and, in proving the service of such notice, it shall be sufficient to prove that the notice was properly addressed and registered.

Where the employer is a body of persons corporate or unincorporate, the notice shall be served by delivering the same at or by sending it by post in a registered letter addressed to the office, or, if there be more than one office, any one of the offices of such body.

A notice under this section shall not be deemed invalid by reason of any defect or inaccuracy therein, unless the judge who tries the action

arising from the injury mentioned in the notice shall be of opinion that the defendant in the action is prejudiced in his defence by such defect or inaccuracy, and that the defect or inaccuracy was for the purpose of misleading.

Definitions.

8. For the purposes of this Act, unless the context otherwise requires,—

The expression "person who has superintendence entrusted to him" means a person whose sole or principal duty is that of superintendence, and who is not ordinarily engaged in manual labour:

The expression "employer" includes a body of persons corporate or unincorporate:

The expression "workman" means a railway servant and any person to whom the Employers and Workmen Act, 1875, applies. 38 & 39 Vict. c. 90.

Commencement of Act.

9. This Act shall not come into operation until the first day of January one thousand eight hundred and eighty-one, which date is in this Act referred to as the commencement of this Act.

Short title.

10. This Act may be cited as the Employers' Liability Act, 1880, and shall continue in force till the thirty-first day of December one thousand eight hundred and eighty-seven, and to the end of the then next session of Parliament, and no longer, unless Parliament shall otherwise determine, and all actions commenced under this Act before that period shall be continued as if the said Act had not expired.

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THE END.

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LEGAL WORKS

EDITED OR WRITTEN BY

JOSIAH W. SMITH, B.C.L., Q.C.,

RETIRED JUDGE OF COUNTY COURTS; AND A BENCHER OF LINCOLN'S INN;

(EDITOR OF FEARNE'S CONTINGENT REMAINDERS, AND AUTHOR OF A TREATISE ON EXECUTORY INTERESTS ANNEXED THERETO; EDITOR OF MITFORD'S CHANCERY PLEADINGS; AND ONE OF THE CONSOLIDATORS OF THE CHANCERY ORDERS.)

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OF

"AN ACT FOR GIVING GREATER EFFECT TO THE TRUE PRINCIPLES OF JUDICIAL DECISION."

BY

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RETIRED JUDGE OF COUNTY COURTS, AND A BENCHER OF LINCOLN'S INN.

EDITOR OF "FEARNE'S CONTINGENT REMAINDERS," AND MITFORD'S "CHANCERY PLEADINGS," AUTHOR OF "A COMPENDIUM OF THE LAW OF REAL AND PERSONAL PROPERTY," "A MANUAL OF EQUITY," AND "A MANUAL OF BANKRUPTCY;" AND ONE OF THE CONSOLIDATORS OF THE CHANCERY ORDERS.

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OF

"AN ACT FOR GIVING GREATER EFFECT TO THE TRUE PRINCIPLES OF JUDICIAL DECISION."

Equally eminent judges have been and are governed by different systems or theories of judicial decision, leading to opposite results: the one mainly proceeding on technical refinements; the other on principles of moral right, natural justice, common sense, and public policy: the one deciding almost entirely on general rules or principles; the other looking to the exceptive circumstances of each case as much as to general rules or principles.

The adoption of the former system by some judges, has led to endless uncertainty, frequent litigation, both original and appellate, incalculable expense and vexation, and the grossest injustice and contravention of public policy. And it has been the prolific source of a mass of refined trash and learned rubbish, which strains the brains, occupies the public time, and exhausts the bodily and mental powers of the judges, to no purpose but to defeat moral right and sound expediency.

To remedy this truly lamentable and mischievous state of things, what is needed (the author submits) is an enactment to this effect:—

"Subject to any plain enactment or plain agreement to the contrary, and subject to the established rules of law, where an exception to such rules is not called for by the circumstances, all cases in litigation, other than cases of construction, shall, in the discretion and to the best of the judgment of the judge or judges deciding the same, be decided, so far as may be, *according to justice, moral right, and public policy;* and all cases of doubtful construction shall, in the discretion and to the best of the judgment of the judge or judges deciding such last-mentioned cases, be decided according to the *presumable intention of the parties or testators.*"

"But the operation of this enactment shall be *subject to any previous decisions* of the superior Courts, clearly and absolutely governing the cases in litigation, in the opinion of the judge or judges deciding such cases."

From the present state of things, which has prevailed for ages, in which a Judge, in many instances, is or supposes himself to be bound to perpetrate some scientific iniquity or some legal monstrosity, he would rejoice to be emancipated by some such declaratory Act as here suggested.

In *Ex parte Parke, In re Potter*, L. R. 18 Eq. 381, in giving judgment, Bacon, V.-C., said: "I come to this conclusion reluctantly, because it is directly against the common sense and justice of the case; but as I feel satisfied it is according to

law, I have no option but so to decide." *Id.* 386; see also 384.

"I do not see why we should not, in a novel case to which no distinct law is applicable, rather follow the justice of the case, than strive to bring the case within a principle which will defeat justice." Willes, J., in *Abrey* v. *Crux*, L. R. 5 C. P. 44.

"In former years, and down to times within my own recollection, judges of what used to be the Common Law Courts of this realm delighted in applying, rigidly and strictly, a series of rules and maxims which their predecessors had delighted themselves in devising, although they did not always commend themselves to the apprehension of the million." Lord Justice James, in *Ashworth* v. *Outram*, L. R. 5 C. D. 941.

"In this Court, we have established a body of dogma, and developed a whole code of artificial rules, according to which a testator's will is treated as if it were something written in cypher, and incapable of being construed except by those learned persons who have the key of the cypher. Nevertheless, sometimes the Court is enabled to determine questions arising upon wills according to the rules of common sense, either by playing off one rule against another, or by resorting to some general rule of construction which controls the rest!" James, V.-C., in *Habergham* v. *Ridehalgh*, L. R. 9 Eq. 400.

"*The picture of law triumphant and justice prostrate*, is not, I am aware, without admirers.

To me it is a sorry spectacle. The spirit of justice does not reside in formalities, or words; nor is the triumph of its administration to be found in successfully picking a way between the pitfalls of technicality. *After all, the law is, or ought to be, but the handmaid of justice;* and inflexibility, which is the most becoming robe of the latter, often serves to render the former grotesque." Lord Penzance in *Combe* v. *Edwards*, L. R. 3 Prob. D. 142.

"It is surely desirable that the rules of this Court should be in accordance with the ordinary feelings of justice of mankind." Mellish, L.J., in *Pilcher* v. *Rawlins*, L. R. 7 Ch. Ap. 273.

In a certain recent case, the judge and jury on circuit decided one way; the Court of Exchequer another way; the Court of Exchequer Chamber reversed the Court of Exchequer, and the House of Lords reversed the Court of Exchequer Chamber! With such cases before us, what reliance can be placed on the Lord Justice Cotton's principle of being bound to construe a will as trained legal minds would do? See L. R. 11 Ch. D. 878.

Magnificent buildings, high-sounding titles, large salaries, costly robes, a vast knowledge and mastery of cases, the greatest ability and conscientiousness—all these things combined—may be of very great importance—the author has not a word to say in derogation of them. But they are of infinitesimally small account when compared with the promotion of moral right, natural justice, and true public policy. And the whole

machinery of law, from first to last, ought to be, and might be, made subservient to this sacred end.

It would appear from the above striking passages from some eminent judges, that the day is dawning when this will be fully seen and felt, and when effect *must* be given to it (*a*).

With these few remarks and quotations the author must leave this *most important* subject to other minds. He *could* write a volume on it.

(*a*) The author thinks that in the hope of promoting the true dignity of the law, and in the just interests of the public, and in further illustration of the very great need of the above suggested declaratory enactment, it may be useful to refer to his remarks in his Common Law Manual, 9th ed., at par. 34, note (*a*)—par. 404—par. 405, note (*a*)—431c—par. 1080, note (*a*)—par. 1201, note (*a*) —par. 1213, note (*a*)—par. 1216, note (*a*)—par. 1340, note (*a*). See also his Equity Manual, 13th ed. par. 22, note (*a*).

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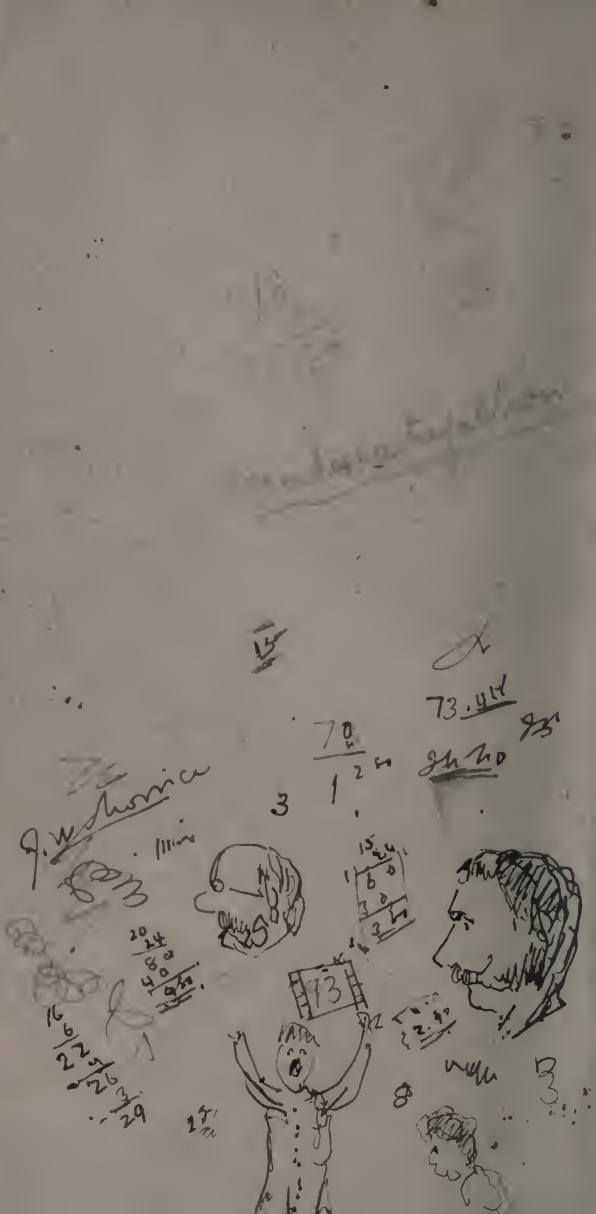

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